The Law Reform Commission of Saskatchewan

Final Report on Private Title Insurance
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A Joint Project Between

Manitoba Law Reform Commission
and
Law Reform Commission of Saskatchewan

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CHAPTER 1

INTRODUCTION

A. SCOPE OF REPORT

In May of 2002, the Hon. Gord Mackintosh, Minister of Justice and Attorney General for Manitoba, asked the Manitoba Law Reform Commission to review and make recommendations on the issue of private title insurers. The Commission entered into discussions with the Law Reform Commission of Saskatchewan and the Alberta Law Reform Institute about collaborating on the project, and shortly thereafter the three organizations agreed to produce a joint report.

In mid 2005, the Alberta Law Reform Institute withdrew from the joint project because of differing priorities. The Saskatchewan and Manitoba Commissions (referred to in this Report as the "Commissions") pressed on, issuing a joint Consultation Paper in July of 2005.[1] Submissions and comments on the Consultation Paper were received up to January of 2006, and they have enabled the Commissions to complete this Report.

The Minister of Justice and Attorney General identified six issues that were of concern to him in 2002, as follows:

1. The public may be at risk when they deal with title insurers because they may not get independent legal advice when they enter into what is usually the largest financial transaction of their lives.
2. The actual product that is being sold may have no value in Manitoba where our land title system already guarantees title.
3. The public land titles system may be at risk because if you are offering insurance, there may not be a need to register at the Land Titles Office.
4. Because surveys are not required, survey defects may not be identified and corrected, potentially undermining the survey fabric of our province.
5. There is no regulation of title insurers, unlike in the U.S.
6. The alliance with some banks to market home closing services seems to breach the *Bank Act* and the *Insurance Act*.[2]

Each of these issues, with the exception of the last,[3] has informed the Commissions' deliberations, but we have not restricted our consideration of the ramifications of title insurance to those specific issues. We have instead attempted to review, in at least a summary way, all issues that are relevant or related to those identified by the Minister, including the issue of "transaction management" services.

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[1] Manitoba Law Reform Commission and Law Reform Commission of Saskatchewan, *Private Title Insurance* (Consultation Paper, 2005) [Consultation Paper].

[2] Correspondence from the Minister of Justice and Attorney General for Manitoba, the Hon. Gord Mackintosh (May 7, 2002).

[3] The specific program which gave rise to this concern has been discontinued.

This Report, like the Consultation Paper, is restricted to a consideration of the effects of title insurance in the context of the conveyancing of residential real property. Title insurance is also available and sold for purposes of commercial conveyancing, but such uses are beyond the scope of this project.

At least two title insurers also offer some form of "bundled" services, generally including the completion and filing of documents used in the conveyancing process — what one submission referred to as "document processing and lender outsource initiatives".[4] Although not a necessary part of the title insurance industry, such services have become so intertwined with the issuance of title insurance in many instances that the Commissions considered it important also to consider it in this Report.

In the end, this Report is concerned with the maintenance of public confidence in the real property system, and whether and how title insurance might affect that public confidence. The Commissions identified two separate aspects of maintaining that confidence:

(1) consumer protection (including the Minister's issues 1, 2 and 5); and
(2) protection of public infrastructure (including the Minister's issues 3 and 4).

In this Report, the Commissions make a number of recommendations that they believe will both protect the interests of individual purchasers and protect the existing public system of land registration, while guaranteeing as much freedom of choice as is compatible with those goals.

B. ACKNOWLEDGEMENTS

This project has presented considerable challenges to the Commissions. The subject matter is complex and requires consideration of several different areas of the law. Furthermore, the project was unlike a "typical" law reform project in that it did not involve review of an existing law or regulation – title insurance in Canada is quite new and there is little or no regulation specific to it. Without concrete evidence of an actual problem or problems, we sometimes questioned whether this was an appropriate subject for law reform, whether such a review was premature, and whether we could make practical recommendations. Despite these questions, we continued because we perceived that the Commissions were the only types of bodies whose mandates permit them to engage in such a review, and because title insurance has been alleged to have the potential to result in significant harm to the public interest.

Another challenge resulted from the decision of the Alberta, Manitoba, and Saskatchewan law reform agencies to adopt this as a joint project. Although Canadian law reform agencies are, in general, cooperative and collegial, different priorities and resources made equal sharing of work and responsibilities impossible and, as noted above, Alberta was required to withdraw from the joint project due to other priorities. We are grateful, however, to the Alberta Law Reform Institute, and in particular to Institute counsel, Sandra Petersson, for providing us with valuable assistance in the form of research and advice.

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[4] Submission by Stewart Title Guaranty Company (September 28, 2005) at 3.

Early in the project, Manitoba Law Reform Commission counsel Sandra Phillips met with a number of individuals and organizations involved in the real property system for informal consultation,[5] and we thank each participant, some of whom travelled to Winnipeg at their own expense to participate. A project advisory committee, consisting of agency staff and private practitioners from each province, assisted staff in understanding the practical and legal realities and formulating the issues for consultation. Our thanks go to the committee members, Lyndon Irwin and Sandra Petersson from Alberta, Alan MacIntyre and Michael Finley from Saskatchewan, and Bruce King and Sandra Phillips from Manitoba.

We also wish to thank all those who participated in our formal consultation in 2005 by providing written submissions.[6] These submissions were of great assistance to our staff in preparing this Report.

Following the close of consultations in the fall of 2005, independent researchers Jonathan Penner and Blane Morgan collated the results of the consultation and, in collaboration with Commission counsel, drafted the final Report for the Commissions. We wish to extend our sincere thanks for their valuable assistance.

It should be noted, however, that the recommendations contained in this Report are those of the Commissions and are not necessarily in agreement with those whom we consulted.

[5] The individuals and organizations are listed in Appendix A.

[6] The participants are listed in Appendix B.

CHAPTER 2

GENERAL OVERVIEW

In order to understand the purpose, effect and implications of title insurance, one must first understand real property conveyancing and the real property systems that exist in Manitoba and Saskatchewan. The procedures and systems are very similar in design and function (and are very similar to those in place in Alberta and British Columbia), although there are some differences that are relevant to the issue of title insurance.

In western Canada, the real property system is made up of three components that form the foundation for security of title and quiet use and possession of land: the land titles system; the survey infrastructure or "fabric"; and the land use management system (planning and zoning control).

The land titles system in western Canada facilitates transfer and provides security of title. The integrity and reliability of this system depends in part upon the survey infrastructure that establishes the legal boundaries of land and provides the geographic reference for the legal description shown on the register. The land use management system ensures that activity and improvements on the land are contained within the land and do not unduly affect other owners.

Our overview of the real property system will commence with a brief description of the process involved in transferring title to real property from a seller to a buyer, and an outline of the systems that exist in Manitoba and Saskatchewan for the registration of interests in real property. This will be followed by a brief outline of the real property systems that exist in other Canadian jurisdictions, in order to provide some useful context. The chapter will conclude with a description of the various areas of the system that have been identified as shortcomings or as being in need of reform.

A. REAL PROPERTY CONVEYANCING

A real property transaction in Manitoba or Saskatchewan begins with an agreement of purchase and sale, usually negotiated without prior legal advice. Many buyers use a standard form offer, which attempts to improve the balance of rights, obligations and expectations between the seller and buyer.[1]

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[1] For example, the offer to purchase forms prescribed in the *Real Estate Brokers Regulation*, Man. Reg. 56/88 R, Schedule A are required to be used by Manitoba real estate brokers and their authorized officials and salespersons. In Saskatchewan, s. 58 of *The Real Estate Act*, S.S. 1995, R-1.3 regulates the content of the offer to purchase, and Bylaw 730 of the Saskatchewan Real Estate Commission requires brokers and salespersons to use approved forms provided by the Saskatchewan Real Estate Association, online: <http://www.srec.sk.ca/pdf/SRECBylaws.pdf> (date accessed: December 7, 2006).

The period of time between the signing of the contract and the closing of the transaction[2] is the buyer's opportunity to discover any problems relating to the property (e.g. incompatible interests such as leases or easements, unacceptable restrictions on its use or non-compliance with statutes, regulations or by-laws).[3] Where such problems are discovered, and depending on the agreement, the buyer may insist that the seller remove or remedy the defect or adjust the purchase price; the buyer may even rescind the agreement in the event of a serious problem.

It is important that this take place before closing because of the common law rules of *caveat emptor* and *merger*, under which a buyer steps into the shoes of the seller upon closing, assuming all benefits and burdens of ownership. A prudent buyer will attempt to discover any problems before closing because afterwards, the buyer's remedies are limited.[4]

While there is no legal requirement that a buyer retain a lawyer to conduct a real property transaction, most do so because the conveyancing process can be complicated and may require legal expertise.[5] Generally, the lawyer's role in a real property transaction includes any steps required to ensure that the buyer get what he or she has contracted for, that the vendor has the capacity and authority to sell, that the property is as described in the offer and that the buyer's interest is properly registered.

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[2] This refers to the final or concluding performance of the parties' obligations under the agreement of purchase and sale. Closing involves the exchange of the conveyancing documents and physical possession for the purchase money.

[3] Encroachments and non-compliance with zoning by-laws are examples of off-title matters. These kinds of problems may not affect the integrity of title but may affect the marketability of land. Generally, a search for off-title matters requires a current building location certificate (in Manitoba) or real property report (in Saskatchewan) from a licensed land surveyor. The certificate or report identifies the location of buildings and structures and any encroachments onto neighbouring land or from neighbouring buildings and structures. The certificate or report may be submitted to the municipal planning authority for confirmation that buildings and structures comply with applicable zoning by-laws.

[4] After closing, a buyer may seek damages from the seller in cases of fraudulent misrepresentation, breach of a collateral warranty or contractual condition, or error *in substantialibus*. The latter has been described as "an error in the very substance of what is sold, an error so fundamental that it goes to the real identity and character of the thing sold. ... To trigger the doctrine, the buyer must end up with something totally different from what he expected to buy, and the vendor expected to sell", *Holmes v. Walker* (1997), 35 O.R. (3d) 699 (Ont. Ct. (Gen. Div.)) at 703, aff'd 41 O.R. (3d) 160 (Ont. C.A.), citing *Zeitel v. Ellscheid* (1991), 5 O. R. (3d) 449 per Finlayson J.A. at 463, dissenting on other grounds.

[5] Both Manitoba and Saskatchewan restrict the provision of legal services in real estate transactions to lawyers; the Manitoba statute refers specifically to the drawing of documents relating to real or personal property: *The Legal Profession Act*, C.C.S.M., c. L107, s.20; *The Legal Profession Act, 1990*, S.S.1990-91, c. L-10.1, s. 30.

B. LAND REGISTRATION SYSTEM

Registration of an interest in land in western Canada is effected within the land titles system[6], the mandate of which is to simplify and facilitate land transactions while also providing certainty of title.[7] The main attributes of the land titles system include a government-administered register, a guarantee of registered fee simple interests, and an assurance fund or comparable provision for compensation.[8]

The land titles system did not replace the general law of real property, but did make particular modifications. The essential feature of the system, the land titles register, is a response to the difficulties of the common law rule of *nemo dat quod non habet*, which says that sellers of land cannot give better title than they have. To avoid or minimize the consequences of the rule, a buyer was required to show an unbroken chain of title (the series of written instruments or deeds creating or transferring interests in land), back to the original grant from the Crown. Searching the chain of title was a costly and time-consuming process that did not provide certainty, because of the possibility of unknown interests (lost or unrecorded deeds, for example) or undiscovered defects in title (such as forged or improperly executed deeds).

The government-operated register replaces the search of the chain of title, and the ascertainment of who owns each parcel of land and what rights in the land are held by others. Upon every transfer of land, title is surrendered to the Crown and re-granted to the transferee. It is the government, and not the grantor, that conveys the legal interest.[9] Since the register is a definitive record of all interests in the land, a search of the chain of title is no longer necessary, making transactions faster, easier, and more secure for purchasers.

Once an interest is registered, its owner has an *indefeasible* title, guaranteed by the state and, at least in theory, secure against all prior interests or claims and subject only to other interests that have been registered in priority.

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[6] Manitoba continues to maintain a deed registry for the less than 5% of privately owned land that has not been brought into the land titles system under *The Real Property Act*, C.C.S.M., c. R30 [Manitoba Act]; see *The Registry Act*, C.C.S.M., c. R50, and the discussion at page 7, below.

[7] The Manitoba Act; *The Land Titles Act, 2000*, S.S. 2000, c. L-5.1 [Saskatchewan Act]; *Land Titles Act*, R.S.A. 2000, c. L-4 [Alberta Act]; *Land Title Act*, R.S.B.C. 1996, c. 250 [B.C. Act]. The land titles system is often referred to as the "Torrens system", for Sir Robert Torrens, who advocated the adoption of a land title system providing certainty of title in South Australia in the 1850s. Legislation establishing the system was enacted in South Australia in 1858. For further information, see T.W. Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (Alberta Law Review Book Series, vol. 1, 1978).

[8] Manitoba provides compensation from the assurance fund, which is funded from fees paid to bring land under the operation of the Manitoba Act. Saskatchewan has not had an assurance fund *per se* since 1992. From 1992 to 2001 all assurance claims were paid from the General Revenue Fund of Saskatchewan. Since 2001, claims relating to incidents occurring after the coming into force of the Saskatchewan Act are paid out of the general operating funds of the Information Services Corporation of Saskatchewan, the Crown corporation that operates the Land Titles Registry: submission by C. Benning, Saskatchewan Registrar of Titles, (October 27, 2005) at 1.

[9] Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859), cited in Manitoba Law Reform Commission, *Towards a New Manitoba Real Property Act* (Discussion Paper, 1991) at 7.

> In the absence of fraud, a purchaser for value ... obtains upon registration a title that cannot be impugned on the ground that the seller's title was defective, or that the conveyance from the seller to the purchaser was invalid for any reason.[10]

One of the concerns about the system is that its benefits come at the expense of some security against future displacement. At common law, one cannot be deprived of an interest in land without one's knowledge or consent, but this is possible under a land titles system, which prohibits (with rare exceptions) actions by a prior interest holder to recover their interest. To balance this reduced protection, the system permits the Registrar either to correct the register or, where that is not possible, to provide an indemnity.

An indemnity against financial loss is provided in the event that someone is deprived of an interest in land through the operation of the system[11] or through an error on the part of the officials administering it. The Joint Land Titles Committee[12] described the problem as follows:

> The interest recording/title registration system functions through the making of entries in registers. System malfunction may consist of the making of an unauthorized entry in a register, or it may consist of an omission to make a required entry.[13]

In Manitoba, the first land recording system was the deed registry established in 1870 by *The Registry Act*. Often referred to as the "old" system, or the deed system, it provided for a public record of deeds but no certainty in terms of the comprehensiveness of the register or the validity of deeds recorded thereon. The land titles system was introduced in 1885 by *The Real Property Act*. Today, most privately-owned land in Manitoba falls under the operation of *The Real Property Act*.[14] All titles created after 1988 in the Winnipeg Land Titles Office are electronic titles, but the registration process is still paper-based, with original signed instruments creating or transferring interests in land submitted in paper form.[15]

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[10] P. O'Connor, "Double Indemnity: Title Insurance and the Torrens System" (2003) 3:1 QUTLJJ, online: <http://www.law.qut.edu.au/about/ljj/editions/v3n1/oconnor_full.jsp> at 9 (date accessed: December 13, 2006).

[11] An example of a situation in which a person could be deprived of an interest in land through the operation of the system would be where a fraudster registers a conveyance of the interest to an innocent third party. This is discussed in more detail below, at pages 16-20.

[12] This committee comprised representatives of the common law provinces and territories of Canada and was established to design a model title registration statute. See *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990) [Joint Land Titles Committee, 1990] and *Final Revisions: Renovating the Foundation*, (1993) [Joint Land Titles Committee, 1993].

[13] Joint Land Titles Committee, 1990, *supra* note 12 at 29.

[14] Ninety-five percent of all "granted" or privately held land in Manitoba falls under the operation of *The Real Property Act*. Only 25% of Manitoba land has been the subject of a grant; the remainder is Crown land.

[15] Manitoba Property Registry, *Frequently Asked Questions* (December 23, 2005), online: <http://www.gov.mb.ca/tpr/assets/docs/faq_lto.pdf> (date accessed: December 12, 2006).

Saskatchewan has never had a deed registry system, and all privately-owned land is registered in the land titles system established in 1886 by federal legislation.[16] In 2000, Saskatchewan effected substantial changes to both the legislation and the registration system with the enactment of *The Land Titles Act, 2000*, and moved to an electronic registry, which receives instruments creating or transferring interests in land in both paper and electronic format.

In substantive terms the most salient differences between the Manitoba and Saskatchewan systems (discussed in more detail below) are:

- Saskatchewan distinguishes between fee simple interests (defined as "ownership") and less than fee simple interests, such as mortgages, while Manitoba does not (an "owner" in Manitoba is defined as a person registered as an owner of land, including an owner in fee simple, or an owner of a mortgage, lease, or encumbrance); and
- Manitoba maintains an assurance fund of "last resort," whereas Saskatchewan's compensation system does not require claimants to exhaust other remedies first (it is a "first resort" compensation system).

C. OTHER CANADIAN JURISDICTIONS

Every Canadian province has developed its own system of managing dealings with real property. While Manitoba and Saskatchewan (and Alberta, and to a lesser extent, British Columbia) introduced similar land titles systems at approximately the same time, other provinces have introduced land titles systems much more recently, or not at all, and in some cases still maintain two different systems. The implications of title insurance vary depending on the type of system in place in a given jurisdiction, so that some understanding of the differences between the prairie provinces and other provinces is helpful when considering those other provinces' experiences and responses to title insurance.

ONTARIO

There are two different systems of recording real property ownership in Ontario.[17] The older system is referred to as a "registry" system, and the newer one, similar in principle to western

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[16] The *Territories Real Property Act*, S.C. 1886, c. 26, replaced by the *Land Titles Act*, S.C. 1894, c. 28. The 1894 statute was replaced in 1906, the year after Saskatchewan became a province, by *The Land Titles Act*, S.S. 1906, c. 24. It should be noted that, as in Manitoba, a significant proportion of the land in the province remains outside the register, being unpatented Crown land.

[17] Much of the following discussion is drawn from K. Murray, "Electronic Registration and Other Modernization Initiatives in Ontario's Land Registration System" (Paper presented at the 'Modernising Irish Land Law and Conveyancing Law' Conference, Dublin, November 25, 2004), online: <http://www.lawreform.ie/Kate%20Murray%20Ireland%20Nov%2010%202004.pdf> (date accessed: December 12, 2006).

Canadian systems, is referred to as a "land titles" system. The *Registry Act* was one of the first pieces of legislation enacted in English Canada, in 1795.[18] The *Land Titles Act*[19] was introduced in 1885, but until relatively recently mainly applied to land in northern Ontario; most of the land in southern Ontario was recorded under the Registry system.

Ontario's registry system records interests in land against geographic entities (e.g. lot and concession). The government offers no statement of ownership or guarantee of title, but warrants only that the register is properly created and that the documents are properly recorded against the register indicated on the face of the documents. When a person wants to obtain title or otherwise deal with land, his or her lawyer must normally conduct extensive searches of historical records in the registry to find the root of title (which is an ostensibly reliable registered transfer document at least 40 years old) and a chain of deeds from that estate holder to the current transferor, in order to ensure that the client actually gets the interest that was expected.

In the land titles system, as in western Canada, the records are organized and maintained as parcels based on ownership. The title record is referred to as the parcel register. The government makes a statement of ownership and guarantees the state of the title, with certain statutory exceptions.

In 1984, Ontario enacted the *Land Registration Reform Act*,[20] which was intended to make the registry and land titles systems more efficient and effective. The Act was amended in 1994[21] to permit the electronic registration of land titles documents; the process of converting all records to electronic format and requiring new land titles registrations to be in electronic form has been ongoing since 1999.[22] Land can, and in some cases must, be brought from the registry system into the land titles system when it is transferred or otherwise dealt with, and the government also converts registry system properties to land titles parcels during the administrative process of automating paper land registration records.[23] While making the registration of land titles documents more efficient and user-friendly, electronic registration has

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[18] S.U.C. 1795, 35 Geo. III, c. 5.

[19] S.O. 1885, 48 Vict., c. 26. The current land titles legislation is the *Land Titles Act*, R.S.O. 1990, c. L.5.

[20] S.O. 1984, c. 32.

[21] S.O. 1994, c. 27, s. 85.

[22] Ontario Ministry of Consumer and Commercial Relations, Registration Division, Real Property Registration Branch, *Bulletin No. 99001: Electronic Registration of Land Titles Documents* (January 26, 1999), online: <http://www.cbs.gov.on.ca/tsso/english/EnglishBulletins/461.pdf> (date accessed: December 6, 2006).

[23] Ministry of Consumer and Business Services, Registration Division, Title and Survey Services Office, *Conversion of Registry Non-converts to LTCQ* (Bulletin No. 2004-02, January 19, 2004), online: <http://www.cbs.gov.on.ca/tsso/english/TopicalIndexBulletinsEng.htm#electronic> (date accessed: December 6, 2006).

also had the effect (among others) of expanding the opportunities for new forms of mortgage fraud.[24]

ALBERTA

A land titles system has been in use in Alberta since 1887, pre-dating Alberta's status as a province.[25] It is very similar in principle and operation to the land titles systems of both Saskatchewan and Manitoba.

Alberta's land titles system has been automated since 1988, and all current titles are maintained in electronic form. All registrations and most title searches are now performed electronically, and all survey plans must be submitted in electronic form.[26]

BRITISH COLUMBIA

Land titles systems were established in the colony of Vancouver Island in 1860, with the enactment of the *Vancouver Island Land Registry Act, 1860*,[27] and in the colony of British Columbia in 1861, with the enactment of the *British Columbia Land Registry Act, 1861*.[28] These Acts were repealed and a single system was established in the combined colony of British Columbia by the *Land Registry Ordinance, 1870*.[29] Currently, although all privately-held land is

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[24] Law Society of Upper Canada, *Mortgage Fraud: Report to Convocation* (March 24, 2005) at 3-4, online: <http://www.lsuc.on.ca/news/pdf/convmar05_mortgage_fraud.pdf> (date accessed: December 6, 2006). The Ontario government introduced Bill 152, the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, on October 19, 2006. Bill 152 was passed by the Legislature and received Royal Assent on December 20, 2006 (S.O. 2006, c. 34). Among other measures, the Act amended the *Land Registration Reform Act* and the *Land Titles Act* to provide that a fraudulent instrument has no effect on the title register, while instruments registered subsequent to a fraudulent instrument are deemed to be effective (a system of deferred defeasibility). The amendments also allow notice to be provided to property owners of instruments affecting their land, remove the requirement that a person must be unable to recover compensation through other means in order to receive compensation from the assurance fund and to prohibit the payment of subrogated claims from the assurance fund.

[25] *Territories Real Property Act*, S.C. 1886, c. 26, replaced by the *Land Titles Act*, S.C. 1894, c. 28; once Alberta achieved provincial status this was replaced by the *Land Titles Act*, S.A. 1906, c. 24.

[26] Government of Alberta, *An Introduction to Alberta Land Titles*, online: <http://governmentservices.gov.ab.ca/pdf/Land%20Titles%20Introduction.pdf> (date accessed: December 12, 2006).

[27] Laws of the Colony of Vancouver Island, c. 26; Appendix to the R.S.B.C. 1871.

[28] Laws of the Colony of British Columbia, c. 169; Appendix to the R.S.B.C. 1871.

[29] R.S.B.C. 1871, 33 Vict., c. 143; a thorough description of the history of British Columbia's early land titles system can be found in *Shotbolt v. British Columbia (Registrar General)*, [1888] B.C.J. No. 4 (S.C.).

in the land titles system, 92% of the land in the province is Crown land, most of which is unsurveyed and not in the system.[30]

On January 20, 2005, responsibility for the British Columbia land titles system was transferred to a new not-for-profit corporation, the British Columbia Land Titles and Survey Authority (the "BCLTSA"), established by the *Land Title and Survey Authority Act*.[31] In addition to the land titles system, the BCLTSA is responsible for the province's land survey structure and for issuing Crown grants of land.[32]

The BCLTSA has continued the development of an electronic infrastructure for the land titles system. All key land registry information is contained in electronic form – some 10 million documents and plans. An electronic filing system was introduced in April 2004, so that lawyers and notaries can submit land title documents over the Internet.[33]

British Columbia is in the process of integrating land, resource and geographic information managed or held by various departments and agencies. The BCLTSA is creating a Digital Survey Plan system in which survey plans may be submitted in digital format, the survey fabric may be maintained automatically and survey information can be obtained on-line.[34] In addition, B.C. has created the Integrated Land and Resource Registry ("ILRR"),[35] which provides on-line access to information about legal interests in Crown land (e.g. tenures, regulated uses, land and resource use restrictions, and reservations) as well as similar information on private land where it is available, including graphic descriptions.[36]

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[30] Land Title and Survey Authority of British Columbia [BCLTSA], *Corporate Outline* (2005) at 7, online: <http://www.ltsa.ca/documents/corporate/corp%20outline.pdf> (date accessed: December 12, 2006).

[31] S.B.C. 2004, c. 66.

[32] BCLTSA, *supra* note 30.

[33] *Ibid.*

[34] BCLTSA, *Digital Survey Plan (e-Survey) Project*, online: <http://www.ltsa.ca/sgd_dspp_home.htm> (date accessed: December 12, 2006).

[35] B.C. Ministry of Agriculture and Lands, Integrated Land Management Bureau, *Integrated Land and Resource Registry*, online: <www.ilrr.ca> (date accessed: December 12 2006); Integrated Land Management Bureau, *Survey Parcel Fabric Reference Guide*, online: <http://ilmbwww.gov.bc.ca/ilrr/PDF/Reference_Guides/Survey%20Fabric%20private%20and%20crown%20reference%20guide.pdf> (date accessed: December 12, 2006).

[36] R. Munzer, "The Integrated Land and Resource Registry" (Paper presented at British Columbia Land Surveyors 101st Annual General Meeting, Integrated Land Management Bureau, 2006), online: <http://www.bclandsurveyors.bc.ca/documents/Publications/Integrated_Land_&_Resource_Registry.pdf> (date accessed: December 12, 2006).

NEW BRUNSWICK

New Brunswick real property was dealt with under a registry system, similar in principle to Ontario's, for over 200 years. The government completed the implementation of a land titles system across the province in 2001, however, and now every time a parcel of land is mortgaged or sold it must be transferred from the old system into the new one.[37]

NOVA SCOTIA

Like New Brunswick, Nova Scotia has only recently introduced a land titles system to replace its original registry system.[38] Implementation began in March of 2003, and was completed on March 1, 2005.[39] Conversion is mandatory in certain circumstances, including transfers of land for value and subdivisions resulting in three or more parcels of land, and the government expects all land in the province to be brought into the new system over the next few years. In addition to the new land titles system, the government is also introducing electronic submission of documents and electronic payment, which are expected to be fully operational throughout Nova Scotia by the end of 2006.[40]

QUEBEC

Quebec maintains an electronic deed registry system (the Online Land Registry). The system is based on the "publication" of rights and interests in land but does not create or confer rights as in a land titles system. In addition to the land registry, Quebec has created a searchable cadastral database called "Infolot" that provides specific graphic information about parcels of land.[41]

The Yukon Territory, the Northwest Territories and Nunavut have land titles systems; Prince Edward Island and Newfoundland and Labrador have deed registries.[42]

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[37] Service New Brunswick, *What Should I Know About Land Titles?* (January 2001), online: <http://www.snb.ca/e/4000/4106e.asp> (date accessed: December 12, 2006); see also F.R. Longstaff, *Big Changes at the Registry Office* (September 28, 2000), online: <http://www.lutz.nb.ca/comm/frank/frank22.htm> (date accessed: December 12, 2006).

[38] *Land Registration Act*, S.N.S. 2001, c. 6.

[39] Service Nova Scotia and Municipal Relations, *Land Registration*, online: <http://www.gov.ns.ca/snsmr/property/default.asp?mn=282.46> (date accessed: December 12, 2006).

[40] Service Nova Scotia and Municipal Relations, *Common Ground* (September 2006), online: <http://www.gov.ns.ca/snsmr/pdf/property/publications/Common_Ground_Sept06.pdf> (date accessed: December 13, 2006).

[41] Approximately 50% of privately owned land in Quebec is included in the database: Association des courtiers et agents immobiliers du Québec, *The Québec Land Registry and Cadastre*, online: <http://www.acaiq.com/cgi-bin/WebObjects/AAVisuel.woa/wa/aller?langue=2&article=5326> (date accessed: December 13, 2006).

[42] *Land Titles Act*, R.S.Y. 2002, c. 130; *Land Titles Act*, R.S.N.W.T. 1988, c. 8 (Supp.); *Land Titles Act (Nunavut)*, R.S.N.W.T. 1988, c. 8 (Supp.); *Registry Act*, R.S.P.E.I. 1988, c. R-10; *Registration of Deeds Act*, R.S.N.L. c. R-10.

D. THE NEED FOR REFORM

The land titles system in western Canada is not perfect, and indeed has been the subject of earlier law reform recommendations. The Joint Land Titles Committee called for the reform of land titles legislation in 1990:

> The existing title registration statutes are based on 19th century Australian or English statutes. Some of their central concepts have served us well. However, they leave problems unsolved. They are opaque, and sometimes downright misleading. They have had to be tortured by courts into new forms to meet current conditions. They hide the light of title registration under bushels of substantive law and administrative detail. They require rationalization and modernization in light of nearly a century and a half of experience of title registration.[43]

The Joint Land Titles Committee's goal in drafting model legislation was to improve the efficiency and utility of the system, essentially modernizing, clarifying, and correcting the system with the added benefit of encouraging harmonization of land titles systems nationally. Saskatchewan's legislation was updated in 2000 and implemented some of the recommendations of the Joint Land Titles Committee. Manitoba has not yet implemented any of the recommendations.

Substantive gaps in the system include the preference given to overriding interests and the exceptions to indefeasibility, discussed below. In addition to these substantive gaps, there are also some procedural aspects of the land titles system that create weaknesses. These weaknesses include the lack of protection during the registration gap,[44] the barriers to compensation created by time limitations and, in Manitoba, the operation of the assurance fund as a fund of "last resort". Each of these gaps, procedural and substantive, will now be explored in more detail.

1. Exceptions to Indefeasibility

As a general rule, once the Registrar issues title, the registered owner has an indefeasible title to land. Like most rules, there are some exceptions to the principle of indefeasibility that have the effect of introducing some insecurity.

First, where two certificates of title exist for the same parcel of land, the earlier or first-issued certificate of title prevails regardless of whether the registered owner is a *bona fide* buyer for value without notice ("innocent buyer").[45] This situation could arise where, for example, a person is shown on a single title as the owner of two parcels of land, and when that person sells

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[43] Joint Land Titles Committee, 1990, *supra* note 12 at 4-5.

[44] The registration gap is the period of time between the closing of a real property transaction and the establishment of priority of the relevant instruments in the registry; see the discussion below at pages 20-21.

[45] Manitoba Act, s. 59(2); Saskatchewan Act, s. 16.

one of the parcels the Registrar creates a new title for the new owner but forgets to cancel that portion of the existing title that shows the original owner as the owner of that land. Alternatively, the Registrar might inadvertently issue a new title to the new owner showing him or her as the owner of both parcels of land.

An inflexible preference for the earlier owner could be perceived as illogical and unfair when the later owner is in actual possession, and in fact the Joint Land Titles Committee 1993 Report recommended that such a conflict be resolved by giving priority to the registered owner in possession and compensating the other registered owner.[46] New Brunswick has introduced some flexibility into its system by empowering the Registrar to compensate the earlier owner and allow the owner in possession to keep the land.[47] In Saskatchewan, it was not considered necessary to include such a specific provision, because it has always been open to the Registrar to negotiate the correction of an error with the parties affected and pay compensation for any losses incurred.[48]

Secondly, the Registrar has the power to correct the register in cases of misdescription, error, or fraud where the registered owner is not an innocent buyer.[49] Thus, some of the uncertainty that existed at common law continues today. The difference is that assurance fund compensation may be available to the buyer who is deprived of his or her interest, whereas at common law there was no remedy.

Another exception to the general principle of indefeasibility is the exception for overriding interests. These interests may affect title notwithstanding the fact that they are not registered. Some of these overriding interests include:

- reservations contained in the grant from the Crown to the first owner;
- easements and rights-of-way;[50] and
- short-term leases (less than three years).[51]

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[46] Joint Land Titles Committee, 1993, *supra* note 12 at 36-42.

[47] *Land Titles Act*, S.N.B. 1981, c. L-1.1, ss. 68-74 [New Brunswick Act].

[48] Submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 3.

[49] Manitoba Act, ss. 23(1), 62(1)(c) and (d); Saskatchewan Act, s. 97. In Saskatchewan, no compensation is available on correction due to misdescription or otherwise (s. 85). Alberta takes a different approach, as the Alberta Act provides, at s. 183(1)(e), that a person deprived of land due to a misdescription may bring an action for recovery of the land regardless of whether the current owner is an innocent buyer.

[50] Manitoba Act, s. 58(1); Saskatchewan Act, s. 18. In Manitoba, both public and private easements are included, whereas in Saskatchewan only public easements are overriding. In Manitoba, it is still possible to acquire an easement by prescription whereas such easements have been abolished in Saskatchewan.

[51] Manitoba Act, s. 58(1); Saskatchewan Act, s. 18.

These overriding interests create a significant blind spot in the register's "mirror of title," because it is not possible to identify all interests in the land with absolute certainty. There is no compensation for loss that occurs as a result of the existence of one of these overriding interests.

The exception for overriding interests derogates from the principle that the register is a complete and accurate mirror of the title. An innocent buyer of land may be bound by interests which, despite due diligence, could not have been discovered by a search of the register or any other source before closing.

2. Fraud

The incidence of fraud in real estate transactions is said to be on the rise and of significant concern, particularly for lenders.[52] Patrick Keogh, Regional Manager of Business Development at the Canada Mortgage and Housing Corporation (CMHC), was quoted in December 2004 as saying that mortgage fraud has an estimated cost to the Canadian public of $600 million annually, and that the "statistics are growing exponentially".[53]

Statistically, fraudulent transactions remain relatively rare, although title insurers say that they form a large and increasing proportion of their payments.[54] Manitoba's assurance fund has only had one claim for fraud by forgery in the past ten years and Saskatchewan has had very few fraud claims in its history. In British Columbia there has been a total of 16 successful fraud claims since 1989, involving a total payout of $679,580.[55] Even Alberta, the province that CTV's 'W-5' dubbed the "mortgage fraud capital of Canada," has relatively few assurance fund claims for fraud by forgery (explained below).[56] Alberta's assurance fund paid out average annual claims of $31,000 from 1989-1990 to 2001-2002 but, when compared to the 400,000 mortgage and transfer transactions annually in that period, the cost per transaction was less than

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[52] S. Leslie, "Title Insurance Can Protect Mortgage Lenders and Consumers against Fraud" 22:11 *Lawyers Weekly*, July 12, 2002.

[53] K. Vanderleer, "Mortgage fraud – protect yourself" 22:49 *Calgary Real Estate News* (December 2, 2004), online: <http://www.cren.ca/content_view?CONTENT_ID=1730&MODE=VOL_ISSUE&VOL_ISSUE_ID=2249&PUB_DATE_DISPLAY=December+2%2C+2004 >; see joint submission by FNF Canada, First Canadian Title, Lawyers Title Insurance Corporation, and St. Paul Guarantee Insurance Company (September 26, 2005) at 11 [joint submission by title insurers].

[54] Submission by First Canadian Title (September 26, 2005) at 11-12; fraud comprised 36% of total payments by FCT in 2004.

[55] Submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 2.

[56] CTV, "Stealing Home", *W-Five*, broadcast March 21, 2005, online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050321/wfive_stealinghome_050318/20050321?hub=WFive> (date accessed December 13, 2006); the program stated that Alberta had 2700 cases of mortgage fraud in one year alone.

$0.10.[57] While the incidence of fraud appears to be low and may represent a small cost to the land registration system, proponents of title insurance argue that the consequences of fraud can be financially and emotionally devastating to individual homeowners.

There are basically three kinds of fraud relevant to this discussion: title fraud, lawyer fraud and mortgage fraud.[58] Title fraud consists of the registration and conveyance of fraudulent interests, with a resultant loss to the holder of an interest in land, and appears to be relatively rare. Lawyer fraud occurs when a lawyer who has been entrusted with mortgage funds converts them to his or her own use, and is rare but can result in very substantial losses.[59] Mortgage fraud is a term used to describe a number of different things, but usually refers to misrepresentations made to lenders in order to obtain mortgage financing, which can result in default in payment and a loss to the lender.[60]

These categories are not, however, watertight or necessarily clearly delineated. For example, a particular event may fall into the category of both title fraud and mortgage fraud. By way of example, a common type of fraud involves a fraudulent transfer of title from the registered owner to another person, and a subsequent mortgaging of the fraudulently transferred title. The fraudster thus defrauds both the registered owner (through title fraud) and the mortgagee bank (through mortgage fraud).

The two most common means by which title and mortgage frauds are perpetrated are through forgery and impersonation. In fraud by forgery, a rogue forges a transfer of land and a discharge of the registered mortgage and uses the ostensibly clear title to obtain a new mortgage.

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[57] N. Siebrasse, "Land Title Conveyancing Practices and Fraud" (Report for the Canada Mortgage and Housing Corporation, December, 2003) at 25 and 54; Alberta's pattern has been that in about half of the years there are no claims and every year or two substantial claims are paid.

[58] Submission by the Western Law Societies Conveyancing Project (November 2005) at 3-4.

[59] In Manitoba, one recent case resulted in claims of approximately $1.3 million: G. Smorang, "President's Report", *Law Society of Manitoba Communique* (January 2006), online: <http://www.lawsociety.mb.ca/communique_jan06.htm> (date accessed: December 13, 2006). A relatively recent British Columbia case has resulted in approved claims, as of December 2005, of $32.5 million against the Law Society of British Columbia: Special Compensation Fund Committee, "The Wirick claims – an update" (2005) 5 *Law Society of British Columbia Benchers' Bulletin*, (November – December 2005) online: <http://www.lawsociety.bc.ca/publications_forms/bulletin/2005/05-12-20_scf-wirick.html> (date accessed: December 13, 2006).

[60] It is worth noting that not all types of mortgage fraud are covered by title insurance, as for example where a property is "flipped" for an inflated sale price before a mortgage is applied for, and the bank fails to detect the fact that the property is worth less than it appears before advancing the mortgage proceeds.

Once the new mortgage is registered, the rogue absconds with the mortgage proceeds.[61] An example of such a case is *Toronto Dominion Bank v. Jiang*,[62] in which a fraudster registered a forged transfer to himself of a home owned by a family who did not know him. He then proceeded to obtain a mortgage against the property to secure a line of credit, which he drew down in full before disappearing. The bank obtained judgment against the true owners of the property for the amount of the line of credit, and the owners were entitled to claim the full amount from the Ontario Land Titles Assurance Fund.

Impersonation fraud, on the other hand, is often perpetrated by an owner who enlists an impostor to impersonate his or her spouse and execute a transfer of land, consent to mortgage, homestead release, etc.[63] The rogue spouse is then able to sell the property, or mortgage it, without his or her spouse's knowledge and, again, absconds with the proceeds. Impersonation may also be committed by someone using false identification documents, by a person who shares the same name as the registered owner, or in situations where the owner is absent for an extended period or not in possession of the land. Such frauds are often discovered when the mortgage falls into default and the lender begins foreclosure proceedings or where the innocent spouse attempts to deal with the property. Once again, both the owner and the lender are innocent parties who suffer a loss as a result of the fraud.

An example of a typical impersonation fraud is *Chornley v. Chornley*.[64] The parties were married for almost 20 years, and then separated. Shortly before the separation the husband obtained a collateral mortgage from the bank by having someone impersonate the wife as the co-signor for the loan. The wife later found out about the transaction and the husband was charged and convicted of fraud. The bank's mortgage on the marital home was, however, upheld by the court as a valid charge on title.

If an innocent buyer takes title from a rogue who has defrauded the original owner, who gets to keep the land? Where there is *immediate* indefeasibility of title, the system protects the innocent purchaser as soon as the transfer is registered. In a *deferred* indefeasibility regime, the first person who buys land from a fraudster will not be protected by the guarantee, but any subsequent innocent buyers will be protected. Land registration systems in the Prairie Provinces seem to provide for immediate indefeasibility in most circumstances, but this is by no means

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[61] *Durrani v. Augier* (2000), 190 D.L.R. (4th) 183 (Ont. S.C.J.); *Youssef v. Ontario (Ministry of Consumer and Commercial Relations)*, [2003] O.J. No. 622 (Ont. S.C.J.). See also B. Aaron, "Mortgage fraud victims can also lose homes" *The Toronto Star* (August 2, 2003), online: <http://www.aaron.ca/columns/2003-08-02.htm> (date accessed: December 13, 2006).

[62] (2003), 63 O.R. (3d) 764 (Ont. S.C.J.).

[63] See *Chornley v. Chornley* (2003), 16 R.P.R. (4th) 186 (Ont. S.C.J.); *Crosstown Credit Union v. Babcock Estate*, [2000] 3 W.W.R. 693 (Man. Q.B.), aff'd (2001), 153 Man. R. (2d) 269 (C.A.); *Hermanson v. Martin* (1982), 140 D.L.R. (3d) 512 (Sask. Q.B.), aff'd (1986), 33 D.L.R. (4th) 12 (Sask. C.A.).

[64] (2003), 16 R.P.R. (4th) 186 (Ont. S.C.J.).

settled law.[65] While immediate indefeasibility provides superior protection to the innocent buyer, it is less generous to the owner in possession, who receives only compensation for his or her loss.[66]

Where the owner is in possession, it will be more difficult for a fraudster to convey ownership of the land to an innocent buyer and cases in which the owner cannot be restored to the register will be rare. Unfortunately, restoring the owner's interest may be more difficult if the fraudster managed to register a mortgage. In Manitoba, the lender may be considered to be an innocent buyer and, accordingly, the owner's interest will be restored subject to the mortgage.[67] However, this was recently determined not to be the case in Saskatchewan. In *CIBC Mortgages Inc. v. Saskatchewan (Registrar of Land Titles)*,[68] the plaintiff mortgagee advanced funds to a fraudster who had registered forged documents transferring title in the property to one Doerksen, and then posed as Doerksen in order to get the mortgage. The court held that because the bank had not been dealing with the actual registered owner, but with an impostor, the bank's mortgage was not valid and fell outside the statutory terms governing Saskatchewan's compensation scheme.[69] As a result, the owners were entitled to have their title restored free of the mortgage.[70] Manitoba's legislation differs from Saskatchewan's in this area, so it is not at all certain that the result would be the same in Manitoba.

In Manitoba, therefore, the owner has a right to claim compensation, which he or she can use to discharge the fraudulently obtained mortgage, but the substantive and procedural shortcomings of the assurance fund, discussed below, place the owner in a vulnerable position. Most of these frauds will be discovered when the lender commences foreclosure proceedings. One hopes that, in these circumstances, lenders will agree to postpone foreclosure until the

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[65] Manitoba Law Reform Commission, *Towards a New Manitoba Real Property Act* (Discussion Paper, 1991) at 8; the Alberta Law Reform Institute (ALRI) suggests that immediate indefeasibility is "probably" the law in Canadian Torrens land titles jurisdictions: Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No. 69, 1993) at 146. The British Columbia *Land Title Act* was recently amended to expressly provide that immediate indefeasibility is the law in that jurisdiction: *Miscellaneous Statutes Amendment Act (No. 2), 2005*, S.B.C. 2005, c. 35, s. 14. However, it has been argued that the amendments may not go quite that far: D.C. Harris, "Indefeasible Title in British Columbia: A Comment on the November 2005 Amendments to the *Land Title Act*" (2006) 64 *The Advocate* 529. The Ontario *Land Titles Act* was recently amended to provide for a system of deferred indefeasibility, *supra* note 24.

[66] O'Connor, *supra* note 10 at 4.

[67] As occurred in *Toronto-Dominion Bank v. Jiang*, *supra* note 62.

[68] [2006] 9 W.W.R. 556 (Q.B.); see also the discussion in *Taylor Ventures Ltd. (Trustee of) v. High Meadow Holdings Ltd.*, (2006) 46 R.P.R. (4th) 281 (B.C.S.C.) at paras. 30-36 with respect to the state of the law in British Columbia, which is similar to that in Manitoba.

[69] The Saskatchewan legislation draws a distinction between fee simple interests and interests that are less than fee simple, such as mortgages. Registration can make a fee simple transfer valid (ss. 13, 15, and 16), but cannot make an interest that is less than fee simple valid (s. 54(3)).

[70] Presumably if the mortgagee had purchased a lender's title insurance policy, the insurance would have compensated it for its loss.

owner can obtain compensation, but delays or uncertainty in the compensation process - for example, the obligation to obtain judgment against the fraudster first - might make such accommodation an unreasonable burden.

In New Brunswick, the land registration system favours an owner in possession, who may retain the land while the person who was defrauded can obtain compensation. New Brunswick's assurance fund also operates as a fund of first resort, meaning that a claimant is not required to exhaust his or her remedies against the wrongdoer before seeking compensation.[71] If the assurance fund pays compensation, the fund then has a subrogated right to pursue the wrongdoer. This common sense approach avoids some of the procedural hurdles in Manitoba. The defrauded lender can seek compensation directly from the assurance fund, which is likely to reimburse for the loss more quickly than foreclosure proceedings would have been concluded.

Though the ideal solution would be to prevent fraud in the first place, prevention has proved to be very difficult. A property owner can do little to protect his or her property from fraud; even if the title were searched daily, many frauds would remain undetected until it was too late. Since the land titles system must finely balance measures designed to improve security of ownership with those intended to facilitate transactions, attention must be given to a cost-benefit analysis of fraud detection measures.

In Saskatchewan, the Registrar is required to notify an owner of any transfer, mortgage or discharge submitted for registration,[72] although the cost-effectiveness of this process is not without doubt.[73] Such notification should alert the registered owner to an attempt to transfer fraudulently or encumber the property and prompt action to challenge the dealing.[74] When notified of possible improper or fraudulent activity, the Registrar has the power to "lock" the register, prohibiting further dealing with the title. Once the register is locked, it is not possible for the fraudster to forge a transfer or register a fraudulently obtained mortgage.[75] New Brunswick also authorizes the Registrar to register a "stop order" to prohibit dealings with land when fraud is suspected.[76]

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[71] New Brunswick Act, ss. 73–77.

[72] *The Land Titles Regulations, 2001*, R.R.S. 2000, c. L-5.1, Reg. 1, s. 22. As of June 2005, the Registrar also sends notices to both the old and the new address after a change of address has been completed: submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 3-4.

[73] Submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 2. On the other hand, the notification system has caught a number of inappropriate transactions, mostly as a result of registering interests against property in error, as opposed to fraud. In one instance, a mortgage was discharged by a fraudster, likely as the first step in obtaining a new fraudulent mortgage, and the discharge was caught by the lender, and in another instance the sudden lack of notices alerted a financial institution to the preparation for a future fraud: correspondence with C. Benning, Saskatchewan Registrar of Titles (October 4, 2006).

[74] Submission by E.D. Brown (January 26, 2006) at 2.

[75] Saskatchewan Act, s. 99(1).

[76] New Brunswick Act, s. 36.

In Manitoba, the Registrar is empowered, in a number of circumstances, to register a caveat against title prohibiting any dealing with the land or an interest in the land, effectively imposing a lock similar to that in New Brunswick and Saskatchewan.[77] One of these circumstances is the suspicion of fraudulent or improper dealing. Unlike Saskatchewan, however, Manitoba does not notify the owner when someone is attempting to deal with the land or an interest in the land. Other than the power to freeze dealings with the land, Manitoba's Registrar does not have a formal fraud detection program in place and there is no attempt to verify the validity of signatures or witnesses to instruments.

3. Registration gap

The potential for problems due to the "registration gap" is one of the selling points of title insurance for lenders. The registration gap is the period of time between the closing of a real property transaction and the completion of the process by which its priority is established in the registry.

In a land titles system, interests have priority according to the order in which they are registered so, obviously, obtaining registration before someone else can register a competing interest is important. Depending on the procedure followed by the Registrar and the volume of transactions, the gap can be a few hours, days or even weeks. The longer the gap, the greater the risk for buyers and lenders seeking to register new interests.

In Manitoba, the gap is quite short as each instrument is assigned its serial registration number when first entered into the system. Though completion of the registration may take days or weeks, the instrument will have priority effective as of the date of initial entry.[78] In Alberta and Saskatchewan, by contrast, instruments do not receive a serial registration number until completion. This can lead to a substantial gap, particularly during times of high volume or when there are problems with the instruments that delay their registration.

Manitoba's process closes the gap considerably but not completely. Instruments are not date and time stamped upon receipt and are not necessarily processed in the strict order in which they are received. Instruments may wait for hours (or days in peak periods) before they are entered into the system and assigned the all-important registration number. It is possible that an instrument affecting title could be waiting for processing on one examiner's desk while another instrument affecting the same land is waiting on another's. Which instrument wins the race will depend upon a number of variables, none of which can be predicted or controlled by the registrant.

In Alberta, where the gap can be substantial, lawyers avoid or minimize the risk of a competing registration by including special instructions in their registration requests that identify

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[77] Manitoba Act, s. 22(1)(a).

[78] Manitoba Act, s. 64; see also the submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 1-2.

the last registration number which should immediately precede the new instrument. Where a subsequent instrument has been registered, the Registrar will decline registration pursuant to the instructions. Similarly, in Saskatchewan lawyers may place conditions on registration, indicating that the document is only to be registered if the title has not changed since a certain day, or if there are no registered interests on title.[79] In practice, lawyers submit their documents for registration several days before the official closing and request registration on the condition that the title is in the state that it was as of a certain date. If that condition cannot be met, the documents are rejected so that the lawyer and client can assess the impact of the changes in the state of the title. There is also an ability under the Saskatchewan Act to request that documents submitted and waiting for registration be rejected at the request of the submitting party. While these practices reduce the risk of loss, they do not avoid the inconvenience, delay, and cost arising from an intervening registration.

It is not just the procedural shortcomings of the system that create a registration gap problem. In Manitoba and Saskatchewan there is a substantive obstacle as well due to the preference given to builders' liens. A builder's lien will take priority over a mortgage if the lien is recorded following the registration of the mortgage but before the mortgage proceeds are advanced.[80] As a result, mortgage proceeds cannot be released until registration is complete, a process which may take days or even weeks. In the interim, the buyer must either pay interest or obtain bridge financing, thus increasing the cost, delay and inconvenience. If there is an intervening registration, there is additional delay, expense and inconvenience while the problem is corrected.

England has resolved this problem to some extent with its system of electronic registration, which records the exact date and time of submission of instruments, combined with statutory provision conferring priority on an instrument as of the exact time of its submission (rather than completion of the registration).[81] The Manitoba Land Titles Office intends to move to a similar system of electronic submission of instruments.[82]

4. Compensation for Loss

Manitoba maintains a compensation fund, called the "Land Titles Assurance Fund," for the purposes of reimbursing persons who are deprived of land or otherwise suffer loss or damage as a result of an omission or error of the Land Titles Office. The source of the fund is the fees paid

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[79] Submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 2; *Land Titles Regulation, 2001*, c. L-5.1 Reg. 1, s. 21.

[80] *The Mortgage Act*, C.C.S.M., M200, s. 17; *The Builders' Liens Act*, C.C.S.M., B91, s. 31; *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1, s. 71.

[81] *Land Registration Act 2002* (U.K.), c. 9, s. 74. See also Law Commission (Eng.), *Land Registration for the Twenty-First Century: A Consultative Document* (Report #254, 1998) at 155-156; Law Commission (Eng.), *Land Registration for the Twenty-First Century* (Report #271, 2001) at 184-185.

[82] Submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 2.

to bring property from the registry system into the land titles system. From the fund's inception in 1885 to the end of the 2004/05 fiscal year, $2.4 million has been paid into the fund, and 117 payments out have been made, totalling $211,829. In the 2004/05 fiscal year, one payment was made, of $26.75. The fund maintains a balance of $125,000 at any given time, with any excess amounts transferred to the province's Consolidated Revenue Fund.[83]

Saskatchewan maintained a similar fund until 1992. In 1992 it was eliminated and all assurance claims were paid from the Province's General Revenue Fund until 2001. Since 2001, claims have been paid either from the General Revenue Fund if they relate to an incident that occurred prior to the coming into force of the *Land Titles Act, 2000*[84] or from the general operating funds of the Information Services Corporation of Saskatchewan, the Crown corporation that operates the Land Registry.[85]

Various shortcomings of the land titles system's compensation scheme have been identified. One is the fact that the relevant legislation provides for a right of action against the fund, and not for a right of compensation. In Manitoba, a claimant must sue the Registrar, along with the wrongdoer,[86] while in Saskatchewan a claimant must first submit an informal claim, and may not sue the Registrar unless the Registrar denies the claim or the claimant is not satisfied with the amount of compensation offered.[87] The Manitoba legislation also permits the Registrar to settle a claim, but doing so is entirely discretionary.[88]

Having said that, it appears that the practice in both Manitoba and Saskatchewan is to settle most claims without requiring the claimants to initiate legal proceedings. The Registrar of Titles in Saskatchewan says that in that province the approach to claims is to "accept any claims that are covered by section 84 and are not excluded elsewhere in the Act",[89] so that most claims are resolved informally and very rarely result in litigation.[90] In Manitoba:

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[83] The Property Registry, *2004/2005 Annual Report* (2005), online: <http://www.gov.mb.ca/tpr/assets/docs/ar2004_05.pdf> (date accessed: December 13, 2006) at 17. This does not represent a limitation on the fund's ability to satisfy legitimate claims, as the Minister of Finance must make payment out of the Consolidated Revenue Fund if there are insufficient funds in the assurance fund: Manitoba Act, s. 187(1).

[84] Saskatchewan Act.

[85] Submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 1; Saskatchewan Act, s. 93.

[86] Manitoba Act, s. 182.

[87] Saskatchewan Act, ss. 89 - 94.

[88] Manitoba Act, s. 191.

[89] Submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 2.

[90] *Ibid.*

> Most claims are paid voluntarily and only in those few cases where the claim is either contested or in accordance with current legislation, where the party must sue the wrong doer first, do matters proceed to court.[91]

In Alberta, as in Manitoba, the fund is one of last resort, available in many cases only after other remedies have been exhausted.[92] New Brunswick, like Saskatchewan, has a fund of first resort so that defrauded owners are compensated and it is the Registrar who may seek to recover from the wrongdoer.[93]

A further feature of the compensation scheme is that claims against the fund may be subject to time limitations,[94] contributory negligence limitations[95] and other limitations and exclusions.[96] Thus, in Manitoba, an owner who has suffered a loss will be denied compensation if the loss was the result of a breach of trust by an executor of an estate,[97] or in Saskatchewan, if it relates to a boundary problem,[98] or for a variety of other reasons.

It is generally understood that only actual monetary loss and reasonable expenses associated with a claim are covered.[99] It has been suggested that this will rarely represent a true or complete indemnity for the loss suffered, particularly in cases of fraud. For example, the provision for payment of reasonable expenses would not necessarily cover the actual legal costs incurred to pursue the claim. Furthermore, victims of fraud experience non-monetary loss from mental distress and consequential loss flowing from the inability to deal with their property. Of course, these kinds of losses are not generally covered by title insurance policies, either. Title insurers say, however, that insurance claims are dealt with more expeditiously than claims under the statutory compensation schemes, minimizing such non-monetary and consequential losses.

In Manitoba, the Registrar's practice with respect to voluntary payments has been to pay all reasonable costs incurred by a claimant, and in the most recent instance where a victim of

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[91] Submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (November 15, 2005) at 3.

[92] Alberta Act, ss. 168-174.

[93] New Brunswick Act, ss. 74-76.

[94] Manitoba Act, s. 189; in Saskatchewan, since *The Limitations Act*, S.S. 2004, c. L-16.1, came into force on May 1, 2005, the general provisions of that Act apply in the same way that they apply to other claims in that province.

[95] Manitoba Act, s. 182(6); there is no equivalent provision in the Saskatchewan Act.

[96] Manitoba Act, s. 190; Saskatchewan Act, ss. 85-86.

[97] Manitoba Act, s. 190(c).

[98] Saskatchewan Act, s. 85(1).

[99] *Youssef v. Ontario (Ministry of Consumer and Commercial Relations)*, *supra* note 61.

fraud obtained judgment against the wrongdoer, the Registrar paid the entire amount of the award, including punitive damages, interest, costs, and disbursements.[100]

A limitation of the compensation scheme system in Saskatchewan is that the land titles system does not guarantee registered interests that are less than fee simple ownership, other than guaranteeing that the land registry recorded them correctly and allowed dealings with them in compliance with the Act. This means that, with respect to such interests, the system does not compensate for losses that result from an otherwise unenforceable, invalid, or null instrument.[101] Less than fee simple interests such as mortgages and leases are not deemed to be valid on registration, and compensation is available only if the Registrar has made an error, and if the interest would be enforceable but for that error. Essentially, if the interest is invalid or null at common law then the actions or error of the Registrar could not have caused a loss.[102] Any loss suffered would have been as a result of the invalidity of the interest or document upon which the registration is based, rather than the error of the Registrar. The compensation scheme is intended to cover losses resulting from the operation of the registry and certain types of fraud, not infirmities arising from other pre-registration processes and procedures.[103]

E. THE SURVEY FABRIC

The survey infrastructure or "fabric" is the system by which land is divided into parcels. The base for the fabric is formed by the original Dominion Government surveys of townships and river lots, which are then further subdivided by plans of roads and plans of subdivisions. This fabric forms the foundation for the quiet possession and orderly development of land, as well as providing the geographic underpinning of the land title registration system.[104] A certificate of title describes the land ownership parcel by reference to its Dominion Government survey designation and plan reference.[105] Survey monuments are placed at the corners of these parcels to define the boundaries of the ownership parcel on the ground.

An accurate, well-defined and properly maintained survey infrastructure is required to meet the needs of owners, municipal planners, utility service providers, and land surveyors. It supports efficient and inexpensive real estate transactions, land use planning and enforcement,

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[100] Submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 2; see *Dowse v. District Registrar, Winnipeg Land Titles*, [2003] 6 W.W.R. 155 (Man. Q.B.).

[101] Submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 1-2; see also *CIBC Mortgages Inc. v. Saskatchewan (Registrar of Land Titles)*, [2006] 9 W.W.R. 556 (Q.B.).

[102] Saskatchewan Act, s. 54(3).

[103] Correspondence with C. Benning, Saskatchewan Registrar of Titles (October 4, 2006).

[104] A. McEwen, "The Significance of Land Title Registration: A Global Perspective" (Paper presented to the 75th Annual Meeting of the Institute of Surveyors of Sri Lanka, Columbo, September 2001) at 4, online: <http://www.ucalgary.ca/~amcewen/SLltr.PDF> (date accessed: December 14, 2006).

[105] For example, "Lot 1 Plan 1000 in Section 10 Township 10 Range 10WPM".

geographic information and mapping, construction, and flood control measures.[106] The integrity of the survey infrastructure is of primary importance because the effectiveness of the guarantee of title is questionable if the boundaries of the land described therein cannot be ascertained.[107]

Surveyors determine and mark the boundaries of land by installing survey monuments (markers) at regular intervals. Ideally, the legal description in the certificate of title will conform exactly to the physical location of boundaries that are defined by the survey monuments on the ground. Where there is a discrepancy between the legal description shown on title and the location of survey monuments on the ground, it is the latter that is determinative.[108]

Despite the imposition of statutory duties and penalties regarding the maintenance of survey monuments,[109] there has been a deterioration in the survey fabric in Manitoba and Saskatchewan.[110] There is no statutory requirement for a purchaser or lender to obtain a new survey when land is transferred. Furthermore, lax or non-existent planning controls, occasionally poor survey methods or standards, and reliance on metes and bounds legal descriptions until the latter part of the 20th century have resulted in defects in the survey infrastructure.[111]

Maintenance of the survey infrastructure has been done on a piecemeal basis. Errors are fixed when they are encountered and monuments are replaced when they are discovered to be

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[106] City of Winnipeg, Planning, Property and Development, *Survey Infrastructure Clearance Program*, online: <http://www.winnipeg.ca/ppd/surveys.stm> (date accessed: December 14, 2006).

[107] The Property Registry, *2004/2005 Annual Report* (2005), *supra* note 83 at 17.

[108] *The Surveys Act*, C.C.S.M., c. S240, s. 39; *The Land Surveys Act, 2000*, S.S. 2000, c. L-4.1, s. 16. For example, errors in legal descriptions have occurred when titles to land adjacent to railway tracks were issued based on proposed railway plans but the actual location of the railway track differed. Discrepancies between the true boundary and the legal description are, with rare exception, corrected by the Land Titles Office.

[109] *The Surveys Act*, C.C.S.M., c. S240, ss. 3-6; *The Land Surveys Act, 2000*, S.S. 2000, c. L-4.1, s. 80(1)(e); *Land Surveyor's Act*, C.C.S.M., c. L60, s. 58; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 442-43. Under the *Criminal Code*, interference with a survey monument is an indictable offence with a maximum five-year sentence. Provincial legislation also provides penalties of fines or imprisonment.

[110] The DLS has not been refreshed since it was initially conducted. Prior to the 1930s, the Dominion government had begun to re-survey but this ended when jurisdiction over land was transferred to the provinces in 1930 pursuant to the Natural Resources Transfer Agreements. On the other hand, the Saskatchewan Registrar of Titles indicated that the survey system in Saskatchewan is not in serious deterioration; however, there may come a time when the volume of secondary surveys is insufficient to act as the primary mechanism for maintaining the survey fabric: submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 4 and 6.

[111] For example, the City of Winnipeg only began to implement planning controls in the late 1950s. Before zoning by-laws were in place, owners of land developed land according to their need or wish; survey monuments were often missing or ignored. Surveyors used metes and bounds legal descriptions, resulting in errors due to the reliance on markers which were not in their original positions.

missing.[112] The Association of Manitoba Land Surveyors estimated in 1997 that 31% of survey monuments in the City of Winnipeg were missing or unfit for use.[113] In some rural areas, portions of the survey infrastructure have disappeared completely.

The maintenance of survey monuments is a municipal responsibility under *The Surveys Act* of Manitoba.[114] Municipalities have for many years requested additional funding to meet their obligations under that Act. In Manitoba, the Property Registry Agency has for the past seven years maintained an annual fund for outline monument restoration; in the 2005/06 fiscal year the fund was set at $180,000. This fund provides matching grants for municipalities so that, in any year, $360,000 may be spent on restoration.[115] In addition, the Agency annually funds a $40,000 special survey program and a $50,000 railway special survey program.[116] It has been suggested that these amounts are not sufficient to keep ahead of deterioration and to remedy outstanding defects.[117]

Despite the lack of diligent and systematic maintenance of the survey fabric, serious boundary disputes are relatively rare. This is no doubt due in part to the cost of litigation. The Registrar regularly mediates boundary misalignments by involving the parties affected; only when the resolution is not acceptable to one or both of the parties is a special survey considered, and parties seldom advance their dispute to the stage of litigation.[118] Less serious defects, such as fences, decks and outbuildings that encroach onto neighbouring lands or road allowances are more common and can, in some cases, result in significant loss or inconvenience.

The deterioration of the survey fabric has, in the past, been mitigated to an extent by conveyancing practices that satisfied lenders' requirements for assuring the security of mortgage loans. This demand has in part been satisfied by, among other things, the buyer obtaining a building location certificate (in Manitoba) or real property report (in Saskatchewan), which

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[112] In Saskatchewan, s. 28 of *The Land Surveys Act, 2000*, S.S. 2000, c. L4.1, requires surveyors to restore deteriorated survey monuments when they are discovered; in Manitoba, s. 2 of *The Surveys Act*, C.C.S.M., c. S240, requires a surveyor who destroys evidence of an original Dominion post to place a monument on the location.

[113] Professional Land Surveyors Business Group presentation to the City of Winnipeg on the deterioration of the survey fabric.

[114] *The Surveys Act*, C.C.S.M., c. S240, s. 6.

[115] The amount of this fund was increased for 2005/06 from the previous level of $150,000. The additional monies are targeted to municipalities outside the City of Winnipeg, because rural municipalities had exhausted the funding allocated to them on three occasions in previous years: submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 1.

[116] Submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (November 15, 2005) at 2. The railway special survey program is set to be completed at the end of the 2006-07 fiscal year: correspondence with R. Wilson (October 30, 2006).

[117] Informal consultation with the Association of Manitoba Land Surveyors, February, 2004.

[118] Correspondence with R. Wilson (October 30, 2006).

became a standard conveyancing practice.[119] However, it appears that the practice is no longer standard, as evidenced by, for example, the fact that City of Winnipeg Zoning Branch has, over the last 10 years, received fewer than one third of the number of building location certificates annually that it did twenty years ago.[120] As a result, it has become increasingly less likely that existing survey defects will be identified and corrected.

Survey defects[121] in this context refer to two kinds of problem: improvements located without respect for surveyed boundaries and zoning regulations (e.g., a garage built partially on the neighbouring property) and land descriptions on titles that do not conform to the actual boundaries on the ground. In the latter kind of defect, the area of the parcel may be smaller or larger than described or, in rare cases, parcels of land are switched, for example where the owners of Lot 4 live on Lot 5 and vice versa.

While the land registration system guarantees an accurate picture of the fee simple interests in the land described in the title, it does not guarantee that the description conforms to the actual boundaries of the property and indeed, one writer has described as an enduring myth the belief that the boundary descriptions and areas of a registered parcel are guaranteed by the state.[122] It is important, therefore, that buyers of land take steps to ascertain that the land they wish to buy is, in fact, the land described in the seller's title.

Building location certificates and real property reports are not filed in the Land Titles Office, but surveyors are required to submit a record of any infrastructure monuments that they replace.[123] Manitoba maintains a survey examination process to resolve differences between the physical monuments and their plan representations, to ensure that errors are not propagated and to mitigate the occurrence of new errors.

British Columbia's Land Title and Survey Authority is in the process of developing a Digital Plan Survey system that is expected, over the long term, to "vastly improve the state of the cadastral system".[124] Although such a system is an excellent tool for recording and

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[119] A building location certificate (BLC) confirms that the buildings and structures on land are located within the boundaries of the land and identifies the nature and extent of any encroachment onto adjacent property or from adjacent buildings. In Alberta and Saskatchewan, buyers obtain a real property report (RPR) which is a more comprehensive survey of the land and identifies both visible and invisible features such as easements, rights-of-way, location of electrical and water connections and pipelines.

[120] The City of Winnipeg requires a BLC to be provided with a request for a zoning memorandum. The City received 4000 BLCs annually from 1995 to 2005; approximately 1500 of these resulted from new construction, for which the City requires a BLC to be submitted. This is a substantial reduction from the 14,000 BLCs submitted in 1986: correspondence with R. Wilson, October 30, 2006.

[121] The term "survey defects" is not strictly accurate, as it mainly refers to problems associated with the location of improvements constructed without respect for surveyed boundaries and zoning regulations: submission by R. Hargraves, Surveyor General of British Columbia (November 1, 2005) at 1.

[122] McEwen, *supra* note 104 at 5.

[123] *The Land Surveys Act, 2000*, S.S. 2000, c. L-4.1, ss. 28-29; *The Surveys Act*, C.C.S.M., c. S240, ss. 2 and 10.

[124] Submission by R. Hargraves, Surveyor General of British Columbia (November 1, 2005) at 2.

maintaining the survey fabric, it is only through the inspection and re-establishment of the survey monuments on the ground and precise geographical location of them that the system can guarantee the extent of the physical land parcel.[125]

F. LAND USE MANAGEMENT

As a general rule of law, property owners can do anything with their land unless it amounts to an actionable nuisance or is restricted by the state in some way. The unfettered exercise of rights by one owner may, however, infringe upon the rights of others, so the state intervenes to balance the competing rights of neighbours.

Land use management attempts to find a balance between the rights of individual owners and the community as a whole. Zoning by-laws reflect the vision and policies established by the community for orderly and planned development and are intended to achieve certain goals such as maintaining property values, fostering economic development and harmony in the community, and enhancing public safety.

In traditional conveyancing practice, the buyer's lawyer makes inquiries with the municipal authority to identify zoning non-compliance in order to shift responsibility back to the seller. As is the case with the identification of survey defects, such inquiries are the primary means of identifying non-compliance for both buyers and municipal authorities. A shift away from this traditional practice, facilitated in part by the availability of title insurance, could result in fewer defects being identified and corrected prior to purchase. Risk of loss due to non-compliance with zoning by-laws is not remote: First Canadian Title reports that municipal issues, arising out of matters such as building permits and municipal orders, are the most frequent type of claim they receive.[126]

To obtain a zoning memorandum or compliance certificate,[127] the buyer submits an original building location certificate or real property report along with the required fee to the municipal planning authority.[128] The authority examines the building location certificate or real property report to determine whether the buildings and structures on the land comply with zoning by-laws, to the extent noted above. If the property does not comply, the authority advises the

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[125] Correspondence with G. Fraser, Examiner of Surveys Manitoba (October 24, 2006).

[126] As reported by First Canadian Title in informal consultation with the Manitoba Law Reform Commission, March 2004; submission by First Canadian Title (September 26, 2005) at 12.

[127] A zoning memorandum is a statement provided by the municipality that the structures on a parcel of land comply with certain aspects of the zoning by-law – primarily the set-back requirements: submission by E.D. Brown (January 26, 2006) at 1-2. In Saskatchewan, a compliance certificate is the equivalent of a zoning memorandum.

[128] Planning legislation does not impose a duty upon municipalities and planning authorities to provide a zoning memorandum or compliance certificate, and they will typically issue them with a disclaimer; see *The Planning Act*, C.C.S.M., c. P80, s. 85 and *The Planning and Development Act*, S.S. 1983-84, c. P-13.1.

buyer. Possible remedies include a licence, a zoning variation or removal of the offending structure.

The required remedies can be quite costly, particularly where building removal or a zoning variance is required.[129] Encroachments on municipal property may be handled differently by obtaining a licence. Although a licence entitles the owner to some indemnity under the municipality's insurance policy for loss caused by the deviation, over time the annual cost of a licence, currently $40 in Winnipeg, will exceed the cost of a title insurance policy. (The City of Saskatoon, by comparison, charges a one-time fee of $100 for a licence.) It is also true that granting a licence does not fix a problem, but merely "normalizes" it and provides the municipality with a source of revenue.[130]

Encroachments onto private property may be costly to correct, whereas title insurance will cover a loss in value or cost to correct non-compliance for a one-time premium. From the consumer's point of view, title insurance may represent a more cost-effective choice.

Using Winnipeg as an example, one can see the results of the trend away from the traditional practice. Until 1987, nearly every buyer of residential land in Winnipeg obtained a zoning memorandum in a purchase transaction. Since 1987, demand for zoning memoranda in Winnipeg has dropped by approximately 70%.[131] One of the factors contributing to this decline has been the relaxation by lenders of their requirement for zoning memoranda. Lenders have in some cases decided to self-insure against non-compliance with municipal by-laws, or have opted to require title insurance instead. However, the decline since 1987 cannot be attributed primarily to lender reliance on title insurance, as an insignificant number of policies were written in Manitoba before 1996.[132] The dramatic decrease in the demand for zoning memoranda has, according to the City, severely impaired the effectiveness of its zoning enforcement mechanism.[133]

Like the trend away from pre-closing surveys, the move from the traditional practice of obtaining a zoning memorandum may have consequences for both private and public interests. Individual buyers may be unable to shift the consequences of non-compliance back to the seller before closing, and may be responsible for the cost of licences, zoning variations, or building

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[129] Obtaining zoning variances may be less costly in Saskatchewan.

[130] Joint submission by title insurers at 14.

[131] As reported by planning officials with the City of Winnipeg in informal consultation with the Manitoba Law Reform Commission, January 2004.

[132] Joint submission by title insurers at 14.

[133] *Supra* note 131.

removal along with the loss in value and use and enjoyment of their land.[134] The public interest may be affected because defects that are undiscovered or simply insured over will, over time, result in deterioration of the integrity of the land management system. Furthermore, municipalities will lose the revenue generated by fees and face increased costs to enforce zoning by-laws.

[134] Of course, if they have foregone the building location certificate or real property report because they have purchased title insurance, many costs would be covered by the insurance: submission by N. Siebrasse (July 20, 2005) at 4. Prof. Siebrasse also notes that the buyer may only be compensated to the extent of the loss of market value of the property, and if the buyer places a higher subjective value on a use, the compensation may not be complete. In his view, this would affect a small minority of buyers.

CHAPTER 3

TITLE INSURANCE

This chapter outlines what title insurance is, its utility in a land titles system, its history in Canada and elsewhere, and the existing regulatory regime. The response to the introduction of title insurance into Canada is also described.

A. GENERAL FEATURES

Title insurance, generally speaking, insures against loss or damage caused by one or more of the following:

- a defect in the title to property;
- the existence of a lien or encumbrance against the title;
- a defect in a document that evidences the creation of a security interest or deed of trust; or
- any other matter affecting the title to property or the right to the use and enjoyment of property, as defined in the policy (subject to the exclusions and limitations in the policy).[1]

A title insurance policy in respect of real property is a contract whereby the insurer agrees to indemnify a person with an interest in land for a loss "of a specific interest in a specific property" due to a "specific cause".[2] Insurance is available for both commercial and residential property and for owners and lenders in both purchase and refinancing transactions.[3]

The term "title insurance" is something of a misnomer, since coverage is not limited strictly to title matters. Title insurance provides coverage for actual monetary loss arising from problems with a buyer's ability to use and occupy land, as well as from defects in title and off-title matters such as survey defects, non-compliance with zoning, outstanding taxes or charges, or lack of access. "Actual monetary loss" usually relates to a loss in market value, or to the cost of remedying defects or non-compliance. Policies issued to lenders insure the security interest in the land, while policies issued to owners insure the equity and, to some extent, quiet use and possession.

Until recently, an owner could only obtain title insurance when purchasing a new property, and not when refinancing an already-owned property. In refinancing transactions, insurance was only available to lenders. At least two insurers now offer policies to existing

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[1] Canadian Council of Insurance Regulators, *Classes of Insurance and Definitions*, approved June 7, 2001.

[2] A. Chapman & R. Niedermayer, "Report on Title Insurance" (Report for the Nova Scotia Barristers' Society, May, 1998) at 21.

[3] In a refinancing transaction, the borrower pays off an existing mortgage and arranges a new mortgage with the same or a different lender.

homeowners, with coverage retroactive to the date the insured acquired the property.[4] The competitive nature of the industry and past experience suggest that other insurers will match this type of coverage.

Title insurance differs from other forms of insurance in that most of the coverage applies to problems that existed at the date the policy was issued but were as yet undiscovered. Coverage for known defects is expressly excluded, but even those can be covered by special agreement, usually when the risk of such a loss is unavoidable, remote, or impractical to remedy.[5] Title insurance policies also include coverage for future risks related to fraud, forgery, and encroachment by neighbouring structures.

Title insurance policies also differ from other types of insurance in that the premium is only paid once, but the policy covers the insured for as long as he or she can suffer loss — usually during the period of indebtedness or ownership of the land. Thus, a policy may cover a period of 20 to 30 years or more.

In addition to a duty to indemnify, a title insurance policy includes a duty to defend the insured's interest. Where someone challenges the policyholder's interest in the land or asserts a conflicting interest, the insurer will assume conduct of any litigation required to protect the policyholder's interest. Unlike the insurer's duty to indemnify for actual loss, the duty to defend is, in theory, not subject to any monetary limit.[6]

The policy limit on an owner's policy is the purchase price or market value of the property at the policy date. Some policies now provide a limit of up to 200% of the value of the property at the policy date, to allow for some appreciation in value over time. The limit on a lender's policy is the amount of the debt outstanding at the date of the loss.

B. THE INCREASING USE OF TITLE INSURANCE

Title insurance has been available in the United States for a very long time. It originated in the late 1800s to protect against shortcomings in the various American conveyancing and land

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[4] First Canadian Title and LawPRO; see J. Melnitzer, "Title insurance settles in" *Canadian Lawyer* (February 2006) 32 at 34; First Canadian Title, *Lawyer Update: Protection From Fraud Now Available For Existing Home Owners Across Canada* (June 2004) online: <http://www.firstcanadiantitle.com/en/products_services/pdf/Lawyer_Update_Western_Canada_June_8_2004_REVISED.pdf > (date accessed December 13, 2006); submission by TitlePLUS (September 23, 2005) at 9.

[5] P. O'Connor, "Double Indemnity: Title Insurance and the Torrens System" (2003) 3:1 QUTLJJ, online: <http://www.law.qut.edu.au/about/ljj/editions/v3n1/oconnor_full.jsp> at 3 (date accessed: December 13, 2006).

[6] B. Ziff, "Title Insurance: The Big Print Giveth but Does the Small Print Taketh Away?" in D. Grinlinton, ed., *Torrens in the Twenty-First Century* (2003) at 372. Ziff suggests, at 387, that the duty to defend could, in effect, be subject to a monetary limit, as the insurer always has the option to pay the amount required under the policy — the lower of the actual loss and the full policy amount plus expenses — and terminate its obligation under the policy.

registry systems, which are mainly not the land titles systems in place in western Canada.[7] Its growth was assured when the Federal National Mortgage Association began to require title insurance as part of its scheme to facilitate low-cost, long-term mortgages for middle and low income earners in the late 1930s. Further demand was generated by the expansion of the secondary mortgage market in the 1980s as mortgages became a commodity to be bought and sold.

The initial use of title insurance in Canada was probably to facilitate land transactions involving American interests. Although the first title insurer was licensed in Canada as early as 1914,[8] it was not until the First American Title Insurance Company entered the market in 1991 that title insurance made significant inroads into the Canadian conveyancing market.

Since the early 1990s, however, the use of title insurance has increased dramatically in Canada. First American Title has reported the sale of its second million policies between 2002 and 2004. This is especially notable considering that the sale of the first million took approximately 11 years. Industry representatives estimate that between 80 and 90 per cent of home sales in Ontario, and 95 per cent of residential refinancing transactions in that province, are covered by title insurance.[9]

There are currently five title insurers active in Canada, namely First Canadian Title,[10] Stewart Title Guaranty Company, Lawyers Professional Indemnity Company ("LawPRO"), Chicago Title Insurance Company, and St. Paul Guarantee Insurance Company. With the exception of LawPRO, each is a subsidiary or Canadian branch of an American insurer.[11]

C. UTILITY OF TITLE INSURANCE IN A LAND TITLES SYSTEM

Critics of title insurance say that it is of limited value in a land titles system. Suppose, for example, that someone fraudulently registers a $10,000 mortgage against an owner's property: a title insurer would compensate the owner for the $10,000, but this only duplicates the coverage that the owner would already have under the land titles compensation scheme. Moreover, if the title insurer has paid the owner, it would then have a subrogated right to seek reimbursement

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[7] Title insurance first appeared in Pennsylvania following the decision in *Watson v. Muirhead* (1868), 57 Pa. 161. The court held that a conveyancer was not liable for failing to advise the buyer of a court judgment affecting title. In contrast to western Canada, Torrens land titles systems have not flourished in the United States, existing only in a handful of jurisdictions. For more information on the history of title insurance in the United States see, *inter alia*, Ziff, *supra* note 6 at 373-374, and N.R. Lipshutz, *The Regulatory Economics of Title Insurance* (1994) at 75-77.

[8] *An Act to incorporate the Title Insurance Company of Canada*, S.C. 1914, c. 118.

[9] Melnitzer, *supra* note 4 at 32.

[10] This is the operating name of FCT Insurance Co. Ltd., a recently incorporated Canadian subsidiary of First American Title.

[11] LawPRO is the errors and omissions insurer for the Law Society of Upper Canada.

from the statutory compensation scheme.[12] This double-coverage and subrogation also applies where someone fraudulently sells an owner's property to an innocent purchaser. The redundancy can become compounded when both the owner and the lender have title insurance and the fraud is potentially covered by the land titles compensation scheme.

How do proponents of title insurance respond to these allegations of redundancy in a land titles system? First, proponents say that title insurance covers matters for which land titles system compensation may be excluded or limited by legislation. Professor Bruce Ziff states that, while the land titles system renders much of the coverage provided by title insurance companies redundant, there are ways in which title insurance may complement the land titles system, such as title insurance's coverage for some overriding interests.[13] Proponents further assert that, even where there is duplication of coverage, title insurance offers a procedural advantage, particularly for fraud claims, in that it is faster and easier for the insured to obtain compensation. This expedited recovery can help reduce the owner's monetary, consequential, and emotional losses. By way of example, in the only case of fraud for which the Manitoba assurance fund paid compensation in the last 10 years, three years elapsed from the first submission to payout, because the owner was required to sue and obtain judgment against the wrongdoer first.[14] Title insurers would argue that the payout under one of their policies would have been much swifter and more predictable.

In traditional conveyancing practice, sale and mortgage proceeds are withheld until registration of the transfer of title is complete, to avoid the possibility of loss due to the registration of a prior interest during the "registration gap". This gap is the period of time between closing and the completion of the process by which an interest in land is created and its priority is established. This delay results in cost and inconvenience for lenders, buyer and sellers. Both title insurance and the Western Law Societies Conveyancing Protocol (described

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[12] The existence of this subrogated right is uncertain in the prairie provinces, and has never been tested: joint submission by title insurers at 5. Recently, however, in *Syvan Developments Ltd. v. Ontario (Ministry of Government Services)*, [2006] 152 O.J. No. 3765 (Ont. S.C.J.), the court considered, in *obiter*, the question of whether a title insurer can have a subrogated right against the assurance fund under the *Land Titles Act*, R.S.O. 1990, c. L.5. Although the court held that the insured had no right to which the insurer could be subrogated because the insured's own neglect contributed to the loss, Cullity J. commented, at paras. 71-72, that "in the absence of an express, or implied, statutory exclusion of the general equitable right of subrogation, I see no reason for inferring an intention to that effect... If it is deemed appropriate to exclude subrogated rights against the Fund, this should, in my opinion be done by a legislative provision to that effect". Ontario subsequently amended the *Land Titles Act* to prohibit the payment of compensation from the assurance fund for subrogated claims: *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, S.O. 2006, c. 34, s. 15(3).

[13] Ziff, *supra* note 6 at 388-389.

[14] Submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (November 15, 2005) at 4; the Registrar General notes that "legislation to convert the Fund to a fund of first resort would have led to a voluntary payout from the Fund within 3 months". In a recent case of fraud in Saskatchewan, on the other hand, the title affected was rectified within three months of the fraud being discovered, payment was made to the owners within two months of receipt of the claim and the determination by the court that the mortgagee was not entitled to claim from the assurance fund was made within nine months after discovery of the fraud (*CIBC Mortgages Inc. v. Saskatchewan (Registrar of Land Titles)*, [2006] 9 W.W.R. 556 (Q.B.)): correspondence with C. Benning, Saskatchewan Registrar of Titles (October 4, 2006).

below) facilitate the early release of mortgage and sale proceeds, although the latter does so at no additional cost to the consumer.

Proponents of title insurance also point to the coverage for off-title matters, such as survey defects and zoning non-compliance, with respect to which the land titles system offers no protection. Critics, on the other hand, prefer the protection afforded by traditional conveyancing practice, such as obtaining an up-to-date survey. By providing coverage for survey defects and zoning non-compliance without requiring an up-to-date survey, title insurance is said to be a lower-cost alternative to traditional conveyancing practice.[15]

Proponents of title insurance also assert a number of procedural advantages of title insurance as compared to the land titles system and traditional conveyancing practice. Under the latter, claimants have a right of action, and thus may be required to sue and obtain judgment before receiving compensation (although this does not appear to be the current practice of the Registrars in either Saskatchewan or Manitoba). Title insurance provides better and more convenient protection, it is said, because the insured has an enforceable right under the contract and claims are paid upon proof of loss. It is difficult to assess how this claim operates in practice, however, since the claims payment and claims rejection histories of title insurers are not publicly available information (unlike those of the land titles registries). Insurers do disclose the total annual amount paid out in claims, and must report to the provincial Superintendent of Insurance annually on the premiums collected and payouts.[16] In addition, federally-regulated insurers must file detailed financial information with the Office of the Superintendent of Financial Institutions, which information is publicly available.[17] As well, title insurers will often publish information on the types of claims paid.[18] Nevertheless, they do not make public details on the number of claims rejected or paid, the amount paid on each successful claim, or the length of time that elapses between the filing of a claim and payout. It is not unreasonable to expect

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[15] R. Zucker, "Title Insurance: Here Today, Here Tomorrow" (Paper presented at the Accredited Specialists Conference, New South Wales Law Society, Queensland, July 2001) at 15, cited in P. O'Connor, *supra* note 5 at 7.

[16] By way of example, information obtained from the Manitoba Superintendent of Insurance shows that in 2004, the five title insurers collected a total of $3.67 million in premiums, and paid out $803,000, a claims ratio of approximately 22%: attachment to submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (November 15, 2005). In 2003, the ratio of losses to premiums for title insurers reported to the provincial Superintendent of Insurance was 20.4% in Manitoba and 21.2% in Saskatchewan: joint submission by title insurers at 19.

[17] For example, for 2005, the two federally regulated insurers (First Canadian Title and St. Paul Guarantee) reported a claims payout to net premium income ratio of approximately 23%: Office of the Superintendent of Financial Institutions, *Financial Data: Property and Casualty Insurance Companies*, online: <http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?ArticleID=568> (date accessed: December 19, 2006).

[18] First Canadian Title's 2004 Annual Report includes a pie chart that shows the percentage of claims paid that related to mortgage enforceability fraud (36%), municipal issues (32%), liens and encumbrances (11%), survey issues (7%) and the like, online: <http://www.firstcanadiantitle.com/en/about/annual_report/Annual%20Report%20-%20English.pdf> at 2 (date accessed: December 19, 2006).

that title insurers will behave similarly to other insurers, and attempt to avoid the obligation to pay claims if there is a possibility that they may be able to do so.[19]

D. ADDITIONAL ADVANTAGES OF TITLE INSURANCE

It has been suggested that large financial institutions are driving the nature and pace of change in the real estate market and these institutions are "marshalling title insurance and technology service providers together in an effort to centralize and streamline the legal aspects of the lending process."[20]

Title insurers have created demand for their product by focusing their activities on three areas of interest for lenders: the demand for mortgage-backed securities, the uncertainty and inconvenience caused by the registration gap, and the desire to reduce costs by streamlining the legal process.

1. Mortgage-Backed Securities

Mortgages have essentially become "commoditized", and are capable of being "bought" and "sold".[21] Financial institutions pool residential mortgages together and sell units to investors. Similar to bonds, the mortgages can generate income, comprising interest and a portion of the principal, for investors. The units are freely traded on the secondary market. The lender keeps sufficient funds or receives a fee to service the mortgages, and its capital is freed up for other uses.[22]

To sell units in the mortgage pool, the financial institution must provide warranties relating to the validity and enforceability of each mortgage in the pool.[23] Title insurance is a cost-effective way to support the lender's warranties, since it is the borrower, not the lender, who pays for the policy.[24]

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[19] See, for example, *Nadvorniamski v. Stewart Title Guaranty Co.* (2006), 149 A.C.W.S. (3d) 690 (Ont. S.C.J.), discussed in J. Jaffey, "Party with insurable interest can pursue title insurance claim", 26:13 *Lawyers Weekly*, August 11, 2006.

[20] J. Cummings, "Lawyers v. Lenders" (2004) 13:4 *C.B.A. National Magazine* at 20, online: <http://www.cba.org/CBA/National/junjul04/cover.aspx> (date accessed: December 13, 2006).

[21] For more information on mortgage-backed securities, see Canada Mortgage and Housing Corporation, *NHA Mortgage Backed Securities*, online: <http://www.cmhc-schl.gc.ca/en/hoficlincl/mobase/index.cfm> (date accessed: December 13, 2006).

[22] B. McKenna, ed., *Title Insurance: A Guide to Regulation, Coverage and Claims Process in Ontario* (1999) at 227.

[23] *Ibid.* at 228.

[24] In fairness, this cost to the borrower may be lower than the cost of a solicitor's opinion or other product that might otherwise be required by the lender: joint submission by title insurers at 7.

2. Registration Gap Coverage

As discussed earlier, the registration gap causes uncertainty and inconvenience for both buyers and lenders. The vagaries of the registration process and the statutory priority granted to certain interests result in the possibility that a conflicting interest with superior priority might be registered during the gap, adversely affecting the priority and security of the new owner and lender.[25] To avoid this problem, the traditional conveyancing practice is to withhold the purchase money and/or mortgage proceeds until registration of the conveyancing documents is complete and priority is confirmed. Since there can be a delay of days or in some cases weeks between closing and final registration, with even greater delay if there is an intervening registration, the buyer often must arrange bridge financing, increasing the cost for the buyer and the administrative work for the lender.[26] Title insurance allows the purchase money to be exchanged immediately on closing, with the insurer assuming the risk of any loss arising from an intervening registration.

3. Streamline or Centralize the Legal Process

Increasingly, lenders are seeking to reduce costs by outsourcing processing and administrative tasks to third party service providers. Most refinancing transactions are now handled in this way, which is made possible by the acceptance of title insurance policies in lieu of traditional means of assuring security, such as surveys and solicitors' opinions. This outsourcing allows the completion of such tasks in a more cost-effective way than relying on lawyers, as was regularly done in the past.[27]

Title insurers and service providers are increasingly seeking to participate in purchase transactions as well as refinancing deals. In Ontario, one company has introduced a "lender intermediary" program in which it acts on the lender's behalf. The service provider conveys the lender's instructions to the buyer's lawyer, advances the mortgage proceeds, receives the solicitor's opinion and then reports to the lender. The service also includes a title insurance policy for the lender.

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[25] First Canadian Title advised that concern about problems arising during the registration gap is the second most frequently cited reason given by customers for purchasing title insurance: submission by First Canadian Title (September 2005) at 10.

[26] In recent years, the registration turn-around time in Saskatchewan has averaged approximately three days: correspondence with C. Benning, Saskatchewan Registrar of Titles (October 4, 2006). In Manitoba, registration turn-around time has averaged between 1.0 days (in rural offices) and 6.5 days (in Winnipeg): attachment to submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (November 15, 2006).

[27] Joint submission by title insurers at 7.

E. REGULATION OF TITLE INSURANCE

There is currently little, if any, regulation in Manitoba and Saskatchewan that is specific to title insurance products. Title insurers are subject to the same regulatory requirements as other insurers in that they must be incorporated (federally or provincially), be licensed in each province in which they offer insurance and for the specific classes of insurance they offer, maintain adequate reserves and a minimum level of capitalization, and report to federal and provincial regulatory agencies.

1. General Regulatory Regime

The conduct of the insurance business in Canada is supervised and regulated by both the federal and provincial governments,[28] and there is a significant amount of integration and cooperation between the government bodies, resulting in some harmonization of insurance regimes nationally. For example, once a company has met the licensing and deposit requirements of one Canadian jurisdiction, it may easily obtain a licence and thus be exempted from complying with deposit obligations and some formalities in other provinces and territories.

The federal Office of the Superintendent of Financial Institutions is concerned primarily with the solvency and stability of insurance companies that are registered under federal statutes. The key statutes governing the activities of federally-registered insurers are the *Office of the Superintendent of Financial Institutions Act*[29] and the *Insurance Companies Act*.[30] Financial supervision by provincial superintendents of insurance is limited mainly to insurers operating under provincial charters, but provincial regulators have primary responsibility in the area of supervision of the terms and conditions of all insurance contracts and the licensing of companies, agents, brokers and adjusters. Provincial regulation tends to focus upon consumer protection, with rules addressing disclosure of information, unfair and deceptive practices, policy provisions and claims procedures.[31]

Beyond defining title insurance and including it in the list of classes of insurance,[32] Manitoba currently has no legislation specific to title insurance. New consumer protection provisions will have an impact on title insurance when the remaining provisions of amending

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[28] The federal regulator is the Office of the Superintendent of Financial Institutions Canada (OSFI). The regulators in Saskatchewan and Manitoba are, respectively, the Saskatchewan Superintendent of Insurance and the Manitoba Superintendent of Insurance.

[29] R.S.C. 1985, c. 18 (3rd Supp.).

[30] S.C. 1991, c. 47.

[31] See C. Rosenstein, "Title Insurance: Understanding Policy Provisions – U.S. Jurisprudence and a Canadian Alternative" (2002) 3 R.P.R. (4th) 214 at 216-219.

[32] *The Insurance Act*, C.C.S.M. c. 140, s.1; *Insurance Company Classes of Insurance Regulation*, Man. Reg. 390/87R, s. 3(n).

legislation passed in June of 2005 are proclaimed in force.[33] The amendments impose stringent requirements on lenders regarding disclosure of costs associated with borrowing, and permit borrowers to cancel optional services, such as insurance, and to purchase mandatory insurance from insurers of their choice; they expressly include mortgage transactions, and there is specific mention of title insurance.

The Saskatchewan Insurance Act also defines title insurance but is otherwise silent on the topic.[34] Saskatchewan, like Manitoba, has recently enacted cost of credit disclosure legislation[35] that also specifically mentions title insurance. Like the Manitoba amendments, the legislation applies to mortgage transactions, allows borrowers to purchase mandatory insurance from insurers of their choice and to cancel optional insurance. The recent Manitoba and Saskatchewan statutes both result from Canada's Agreement on Internal Trade which, *inter alia*, aims for harmonization of provincial regimes relating to consumer protection measures and standards.[36]

Ontario and Alberta require that title insurance policies include a statement expressly limiting the insurer's liability to a sum stated in the contract,[37] and Ontario also requires that the insurer obtain a certificate of title from an independent lawyer.[38]

Manitoba's *Insurance Act* prohibits unfair or deceptive practices, including:

- misrepresenting the terms or benefits of a policy;
- gifts or inducements to gain business;
- any charge for a premium allowance or fee other than a sales commission stipulated in a contract; and

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[33] *The Consumer Protection Amendment Act (Cost of Credit Disclosure and Miscellaneous Amendments)*, S.M. 2005, c. 16. Sections 17 and 22, dealing with administrative penalties, were proclaimed on September 18, 2006: *Man. Gaz.*, September 23, 2006. With the exception of ss. 3(5), 3(6)(b) and (c), and ss. 17, 22 and 23, the remainder will come into effect on April 1, 2007; *Man. Gaz*, December 2, 2006.

[34] S.S. 1978, c. S-26, s. 2(1).

[35] *The Cost of Credit Disclosure Act, 2002*, S.S. 2002, c. C-41.01, in force October 1, 2006, as amended by S.S. 2006, c. 5.

[36] *Agreement on Internal Trade* (July 18, 1994; in effect July 1, 1995), online: <http://strategis.ic.gc.ca/epic/internet/inait-aci.nsf/en/Home> (date accessed: December 13, 2006).

[37] *Insurance Act*, R.S.O. 1990, c. I.8, s.139; *Insurance Act*, R.S.A. 2000, c. I-3, s. 531(4).

[38] *Classes of Insurance Regulation*, R.R.O. 1990, Reg. 666, s. 3 (3) which provides:

> 3(3) A licence issued to an insurer to undertake title insurance in Ontario is subject to the limitations and conditions that no policy of title insurance shall be issued unless the insurer has first obtained a concurrent certificate of title to the property to be insured from a solicitor then entitled to practise in Ontario and who is not at that time in the employ of the insurer.

- conduct that unreasonably delays the resolution of claims.[39]

As well, in Manitoba and Saskatchewan, an insurer may be prohibited from using a form of policy, application or endorsement that is unfair, fraudulent or not in the public interest.[40] Under *The Saskatchewan Insurance Act*, the Superintendent of Insurance may also institute, assume the conduct of or defend any proceedings to enforce or protect a consumer's rights, if satisfied that the conduct of the insurer was misleading, unconscionable or deceptive.[41]

2. Regulation Of Title Insurance In The United States

Title insurers in the United States are generally subject to much greater regulation and scrutiny than they are in Canada. However, they also have traditionally played a much greater role in the conveyancing process than do Canadian insurers. Some of this added regulation is directed at the insurers' role in the conveyancing process and not just the provision of insurance; identical regulation in Canada may not be justified. Nevertheless, the American experience is at least instructive.

Unlike Canadian jurisdictions, where the conduct of a real property transaction is considered the practice of law, and therefore reserved to lawyers,[42] the process for closing or settling real estate transactions in the U.S. varies from state to state and sometimes from county to county. Some states restrict the conduct of such transactions to lawyers, while others allow a variety of other actors to conduct closings, including lenders, title insurers, title insurance agents, escrow companies, escrow agents, and real estate brokers.

Individual states regulate title insurance, while the United States federal government regulates the provision of conveyancing services (referred to as settlement services) in federally

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[39] *The Insurance Act*, C.C.S.M. c. I40, s. 113. Alberta, Ontario, New Brunswick, the Yukon Territory, the Northwest Territories, and Nunavut have similar proscriptions: *Insurance Act*, R.S.A. 2000, c. I-3, s. 509; *Insurance Act*, R.S.O. 1990, c. I.8, ss. 438-39 and the *Unfair or Deceptive Acts or Practices Regulation*, O. Reg. 7/00; *Insurance Act*, R.S.N.B. 1973, c. I-12, ss. 369-369.2; *Insurance Act*, R.S.Y. 2002, c. 119, ss. 249-50; *Insurance Act*, R.S.N.W.T. 1988, c. I-4, s. 239; *Insurance Act (Nunavut)*, R.S.N.W.T. 1988, c. I-4, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28 and amended for Nunavut pursuant to the *Nunavut Act*, S.C. 1993, c. 28, ss. 239-40.

[40] *Ibid.*, s. 16. Similar provisions exist in other provinces: B.C. *Financial Institutions Act*, R.S.B.C. 1996, c. 141, s. 93; Alberta *Insurance Act*, R.S.A. 2000, c. I-3, s. 507; Ontario *Insurance Act*, R.S.O. 1990, c. I-8, s. 117; New Brunswick *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 117; PEI *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 106; Nova Scotia *Insurance Act*, R.S.N.S. 1989, c. 231, s. 15; Newfoundland and Labrador *Insurance Companies Act*, RSNL 1990, c. I-10, s. 91; Yukon *Insurance Act*, R.S.Y. 2002, c. 119, s. 43; NWT *Insurance Act*, R.S.N.W.T. 1988, c. I-4, s. 34; *Insurance Act (Nunavut)*, R.S.N.W.T. 1988, c. I-4, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28 and amended for Nunavut pursuant to the *Nunavut Act*, S.C. 1993, c. 28, s. 34.

[41] S.S. 1978, c. S-26, s. 6.1; a similar provision exists in the B.C. *Financial Institutions Act*, R.S.B.C. 1996, c. 141, s. 96.

[42] *The Legal Profession Act*, C.C.S.M., c. L107, s. 20; *The Legal Profession Act, 1990*, S.S.1990-91, c. L-10.1, s. 30.

regulated mortgage transactions through the *Real Estate Settlement Procedures Act* (RESPA).[43]

State legislation with respect to title insurance focuses on a number of matters.[44] For example:

- Most regulating states require an examination of title and the application of sound underwriting practices as a pre-condition to the issuance of a policy.
- Regulatory control of rates and forms ranges from simple filing requirements to state approval to state promulgation of rates and forms. For example, Florida and Texas set premium rates. North Carolina ties premiums to the amount of the insured mortgage rather than a flat rate.
- Some states set a limit, called the single risk limit, on the amount of insurance which may be provided for any one property, usually 50% of the insurer's surplus.
- Many states prohibit title insurers from offering other kinds of insurance in addition to title insurance.
- A number of states (Florida, Ohio, New Mexico, and Texas) require a current survey as a pre-condition to survey coverage.
- Some states impose liability on title insurers for the errors, omissions or fraud of their agents who act as conveyancers or escrow agents while others require insurers to provide closing letter protection, which is coverage for loss arising from the acts or omissions of the agent.
- Some states regulate controlled business arrangements, in which one person or entity who is in a position to refer settlement business has a direct or beneficial ownership interest in or is affiliated with a conveyancing services provider. In general, state legislation limits the amount of revenue that an entity can derive from such an arrangement and requires disclosure to the consumer.

There are significant differences between the title insurance industries of the United States and Canada, which may justify differences in regulatory regimes. At present, in Canada, there is no regulation of conveyancing services and very little regulation that is specific to title insurance.

3. The Response To Title Insurance in Canada

Though the Ontario legal profession initially resisted title insurance, it later decided to offer its own title insurance product, TitlePLUS, through LawPRO, the errors and omissions insurer of

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[43] *Real Estate Settlement Procedures Act*, 12 U.S.C., ss. 2601–2617. Federally regulated mortgages include mortgages purchased, guaranteed or insured by a federally chartered company or federal agency (such as the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the Federal Housing Association, and the Department of Veterans Affairs), and other loan transactions secured by a lien on residential property, such as refinancing transactions, equity lines of credit, reverse mortgages, and home improvement loans.

[44] For a review of the regulatory approach of individual states, see J.L. Gosdin, *Title Insurance: A Comprehensive Overview*, (American Bar Association, 1996) at 1-2 and 102-179.

the Law Society of Upper Canada. TitlePLUS is intended to overcome the perceived shortcomings of private title insurance by incorporating the following into both underwriting practice and terms of coverage: independent legal advice, minimum due diligence requirements and the mandatory registration of instruments. In this way, TitlePLUS asserts that it retains some of the consumer protection mechanisms provided by traditional conveyancing practice, primarily by maintaining certain standards of practice for real property conveyancing.

In western Canada, there is greater resistance to title insurance, in large part because of the almost universal presence of land titles systems. Rather than seeking to compete with title insurers directly by offering a title insurance product, the western law societies attempted to develop practice standards to provide similar benefits by creating the Western Law Societies Conveyancing Protocol (the "Protocol") in 2001. The expressed rationale for the Protocol is to increase efficiency for lenders, maintain access to independent legal advice and preserve the integrity of the land titles system. The Protocol attempts to achieve these goals by simplifying and streamlining the conveyancing process for lenders and by providing a source of recovery for both lenders and buyers in the event of a problem.[45]

The Protocol is a process which, if followed correctly, allows the lawyer to release the solicitor's opinion on title immediately upon closing rather than waiting for completion of registration. The Protocol provides some procedural shortcuts, which exposes the lawyer to some risk in the event that his or her opinion turns out to be incorrect as a result of an intervening registration. Accordingly, the Protocol provides that the professional liability claims fund will indemnify a buyer or lender who suffers an actual monetary loss as a result of the registration on title, during the registration gap, of an interest which adversely affects the buyer's interest or the lender's security.

The Protocol also facilitates the lender's waiver of a current survey, as the professional liability claims fund will indemnify the lender (but not the owner) against actual monetary loss due to a survey defect. If clients choose to forgo obtaining a current survey, the Protocol requires that lawyers continue to advise their clients of the benefits of a survey and have clients sign acknowledgments of such advice. Thus, like title insurance, the Protocol dispenses with the need to obtain a current survey.

The Protocol enables a lawyer to meet the lender's security requirements by providing coverage for loss due to survey defects or registration timing issues. Some financial institutions have accepted the Protocol for assuring their security,[46] but most major financial institutions continue to prefer title insurance. Certainly title insurance offers more extensive protection to

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[45] Law Society of Manitoba, *Western Law Societies Conveyancing Project*, online: <http://www.lawsociety.mb.ca/conveyancing.htm> (date accessed: December 13, 2006).

[46] The Bank of Montreal has approved the Protocol for use in the prairie provinces and GE Capital Canada has approved its use in western Canada: Law Society of Manitoba, *Notices to the Profession: Bank of Montreal Says 'Yes' To Protocol Closings Across Western Canada*: online: <http://www.lawsociety.mb.ca/notice_bofm.htm> (date accessed December 13, 2006); T.J.P. Killeen, "President's Report", *Law Society of Manitoba Communique* (May, 2002), online: <http://www.lawsociety.mb.ca/communique_may02.htm> (date accessed: December 13, 2006).

lenders and purchasers than does the Protocol.[47] It has also been suggested that the Protocol is "ineffective and not practical,"[48] and that the Law Societies, in providing an indirect indemnity to lenders and purchasers, may be engaging in the provision of title insurance as defined in the relevant legislation without being subject to the regulatory and statutory requirements applicable to competing title insurance products.[49]

[47] Joint submission by title insurers at 9-10.

[48] Submission by R.L. Tyler (November 1, 2005) at 2.

[49] Joint submission by title insurers at 8-9.

CHAPTER 4

PROTECTION OF PUBLIC SYSTEMS

As will be evident by now, the real property conveyancing system is complex and comprises a number of distinct components. By responding to the demand for cheaper, simpler, faster, and more secure conveyancing practices, title insurance has brought to light weaknesses in traditional conveyancing practice and has offered a solution. However, the solution offered may cause or exacerbate other weaknesses.

There is little disagreement about the value of an efficient and secure real property conveyancing system. Where disagreements arise, they often relate to the tension between measures promoting facility of transfer and those supporting security of ownership. The balance between facility of transfer and security of title may be upset by changes to the conveyancing system resulting from the introduction of title insurance and conveyancing services. The guiding principle must be the maintenance of public confidence in the real property system.

A. PROHIBITING THE SALE OF TITLE INSURANCE

One of the options the Commissions set out for consideration in the Consultation Paper was an outright ban on the sale of title insurance. This is, of course, the most extreme solution to the perceived difficulties caused by title insurance. An absolute ban could only be justified where the harm created by title insurance overwhelmingly outweighs its benefits or, in other words, where the product is of very little value to the consumer but poses a significant threat to the consumer and/or the public interest.

Critics of title insurance point to the experience in the United States as evidencing, at worst, an active intention to weaken land registration systems further or, at the least, a careless disregard for this result. The title industry in the United States does not cure recording defects by drawing them to the attention of the registry "but, rather, imposes its own defects by encouraging continued lack of title security, inefficiency, and unnecessary consumer costs".[1]

Canadian title insurers assert that our strong land titles system benefits their industry, and that they have every incentive to maintain its reliability and integrity. However, it is possible to foresee a potential negative impact on the land titles system when defects in title or land use are insured over rather than corrected. This is like dealing with cracks in the wall by covering them with wallpaper: there is always a risk that a problem that may have initially been simple to correct will become more difficult and expensive to fix with time. Some respondents considered such a risk minimal to non-existent;[2] others predicted that over time titles will "make no sense" as a result of problems being insured over, since the owner will not know whether a mortgage or

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[1] B. Goldner, "The Torrens System of Title Registration: A New Proposal for Effective Implementation" (1982) 29 UCLA L. Rev. 661 at 661.

[2] See, e.g., submission by N. Siebrasse (July 20, 2005) at 2-3.

other charge on land affects the title or not.[3] The Commissions consider the latter eventuality to be unlikely; although the true position probably lies somewhere between these two extremes, the risk of severe damage to the land title system is not great.

To date, Iowa appears to be the only jurisdiction to prohibit the sale of private title insurance.[4] Iowa enacted its ban in 1947 in response to the failure of a number of title insurance companies, which had left policy holders without recourse. The Commissions consider it significant that the ban resulted from the financial weakness of title insurers, and not from any perceived inherent problem with title insurance *per se*. It is likely that existing regulation of title insurers in Canada is adequate to prevent the appearance of similar weaknesses here.

Iowa continues to operate a registry system, rather than a land titles system, but in 1986 the state set up a "Title Guaranty" program,[5] which is essentially public title insurance.[6] The program operates as follows:

> Iowa's system relies on an abstract and title opinion process. Once a participating abstractor prepares an abstract, a participating attorney reviews and then issues an attorney's title opinion or Title Guaranty Commitment. All Iowa commitments, Title Guaranty Certificates and endorsements are issued using standard ALTA [American Land Title Association] forms. Iowa's pricing for Title Guaranty for a residential transaction is just $110 for coverage up to $500,000 and an additional $1 per thousand over $500,000. Most common endorsements are offered at no charge. For a residential transaction not involving a transfer of title such as a refinance or second mortgage, the premium is just $90 up to $500,000....
>
> Once the transaction is complete, any title objections are cleared and new mortgage documents are recorded, the abstract is re-continued to reflect the new data. Then, either the participating attorney or Title Guaranty will issue the Certificate.
>
> All funds generated by Title Guaranty in excess of operating expenses are transferred to the Iowa Finance Authority to support housing programs for first time homebuyers. All revenue remains in Iowa.[7]

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[3] Submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 3.

[4] *Iowa Code 2005*, s. 515.48 (10).

[5] Iowa Legislative Fiscal Bureau, *Iowa Finance Authority Title Guaranty Program* (February 2, 1997), online: <http://www.legis.state.ia.us/lsadocs/IssReview/1997/IR120U.PDF> (date accessed: December 13, 2006).

[6] Iowa State Bar Association, *Title Insurance*, online: <http://www.iowabar.org/Legislation.nsf/d7ff6dc91c517cdb862567ba00690c91/6b15a44c951cf2498625687a000c976d!OpenDocument> (date accessed: December 14, 2006).

[7] Iowa Finance Authority, *Title Guaranty – Program Information*, online: <http://www.iowafinanceauthority.gov/index.cfm?nodeID=9909&audienceID=1> (date accessed: December 14, 2006).

Recently, Iowa considered a repeal of the prohibition on private title insurance. The Iowa State Bar Association objected to such a repeal,[8] while realtors, bankers, credit unions, and others supported it.[9] The lawyers argued that title insurance was unnecessary and would negatively affect the integrity of the land records system. The realtors pointed out that the existing system was slower and more expensive than title insurance, and that lenders were increasingly purchasing title insurance from other states (which is permissible) in preference to title guaranty policies.

In the end, Iowa did not repeal its ban on private title insurance. It is also of interest that no other state has seen fit to follow Iowa's lead and ban private title insurance.

In the Commissions' opinion, an absolute ban on the sale of private title insurance would be a disproportionate response to the possible harm caused by it, and would not address the underlying weaknesses of the real property system to which title insurance has been a response. Instead, we are recommending other measures that may reduce any possible harm to the public interest while preserving access to a product that is of benefit to some consumers. There was support from several respondents to the Consultation Paper (in addition to the title insurance companies themselves) for maintaining the option of title insurance.[10] Even some of the submissions that most vigorously opposed the introduction of title insurance acknowledged that it may meet a legitimate need in certain circumstances, or that total prohibition may not be realistic.[11]

As TitlePLUS noted in its submission to the Commissions, if the land titles system experiences negative effects in the long term, the most obvious culprit will be the willingness of government and/or the relevant Law Societies to condone loose conveyancing practices or conveyancing undertaken outside the jurisdiction of the Law Society, and not the introduction of title insurance *per se*.[12]

In the circumstances, the Commissions are not prepared to recommend a prohibition on title insurance.

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[8] Iowa State Bar Association, *Title Insurance: A Fleecing of America*, online: <http://www.iowabar.org/information.nsf/2b85a4ea12f4bfac8625669d006e27ab/d34f4300659d0c32862570b400135f6d!OpenDocument> (date accessed: December 12, 2006). Ian Smith, Director and Registrar, BCLTSA, endorsed the concerns of the Iowa Bar Association: submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 2.

[9] Iowa Association of Realtors, *Title Insurance in Iowa*, online: <http://www.iowarealtors.com/legislative/titleinsurance.htm> (date accessed: December 14, 2006).

[10] In particular, the submissions by the Canadian Institute of Mortgage Brokers and Lenders (September 9, 2005), the Consumers Council of Canada (September 29, 2005), R.L. Tyler (November 1, 2005) and N. Siebrasse (July 20, 2005).

[11] See, e.g., submission by the Association of Manitoba Land Surveyors (September 29, 2005) at 3, and submission by the Law Society of Manitoba (October 6, 2005) at 7.

[12] Submission by TitlePLUS (September 23, 2005) at 2.

B. IMPLEMENTING JOINT LAND TITLES COMMITTEE RECOMMENDATIONS

As noted in the Consultation Paper, in the early 1990s the Joint Land Titles Committee[13] produced a comprehensive study, as well as model legislation, designed to resolve some of the weaknesses of the land titles system identified in this Report. Implementation of the model legislation would improve the integrity and reliability of the land registration system and would close many of the gaps in protection. This would reduce the need for title insurance.

RECOMMENDATION 1

Manitoba and Saskatchewan should each implement the recommendations of the Joint Land Titles Committee made in 1990 and 1993.

C. COMPULSORY REGISTRATION OF INSTRUMENTS

While most holders of interests in land register those interests in order to protect their priority, in Manitoba there is no incentive for the timely registration of discharges of interests, such as mortgages. The Saskatchewan *Land Titles Act, 2000*, by contrast, requires an interest holder to discharge an interest registration within 30 days of the fulfillment of obligations pursuant to the instrument on which the interest is based.[14] Similarly, British Columbia has enacted a statutory duty on lenders to provide discharges within a specified time.[15] The Saskatchewan legislation provides that failure to comply constitutes an offence, which may lead to the levy of a fine.[16] The British Columbia legislation contains a similar provision (with stiffer fines), but also provides that breach of the obligation renders the offender liable to the borrower for any resultant loss suffered by the borrower.[17] Providing similar incentives would help to ensure that certificates of title accurately reflect the current state of the title.[18]

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[13] Joint Land Titles Committee, 1990; Joint Land Titles Committee, 1993.

[14] Saskatchewan Act, s. 66.

[15] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 72; see submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 3. Section 72 was brought into force January 1, 2005: B.C. Reg. 274/2004.

[16] Saskatchewan Act, s. 117.

[17] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, ss. 105, 171, 189(3)(d), 190, 192.

[18] Manitoba real estate lawyer E.D. Brown recently canvassed other practitioners regarding whether they would support legislation that would require mortgagees to provide (or register) discharges within 30 or 60 days of being paid in full, failing which there would be meaningful monetary penalties: E.D. Brown, "Mandating Discharges of Mortgages" in The Manitoba Bar Association, *Headnotes and Footnotes* (December 2006) at 8. Twenty-four responses were received in favour of a proposal to mandate the timely discharge of mortgages and other related security and two were received against; the responses also raised a number of issues to consider in the development of legislation: correspondence with E.D. Brown.

RECOMMENDATION 2

Manitoba should amend its legislation to require interest holders to discharge registered interests within 30 days after the interests cease to exist, failing which they would be subject to a fine and required to make compensation for any resultant losses. Saskatchewan should amend its legislation to add the requirement for compensation.

D. CLOSING THE REGISTRATION GAP

Closing the registration gap, described above in chapter 2, would improve certainty and security in the conveyancing process. This would, once again, reduce the need for title insurance.

One reform that would address the registration gap problem is to confer priority on instruments based on the date and time of their initial entry on the register rather than completion of the registration. This is how the system works in British Columbia.[19] It also appears to be the effect of the Manitoba procedure,[20] but perhaps this should be enshrined in legislation similar to that of British Columbia, or that of England and Wales.[21] Consistent with the current practice in Manitoba, any such system should exclude documents that are so obviously defective that they must be completely redone,[22] for which the lawyer or other person who submitted them would have to take responsibility.[23]

In Saskatchewan, as noted in chapter 2, the current legislation merely permits applicants for registration to place conditions on their application so that the registration is not completed if an intervening registration occurs. It would be preferable to adopt the type of system discussed here, although it is recognized that this may require significant modification of the existing electronic registration system.[24]

RECOMMENDATION 3

Manitoba and Saskatchewan should each amend its legislation expressly to confer priority on registered interests according to their initial entry rather than according to when their registration is complete.

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[19] Submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 4; see *Land Title Act*, R.S.B.C. 1996, c. 250, ss. 153 and 168(4).

[20] Manitoba Act, s. 64.

[21] *Land Registration Act 2002* (U.K), c. 9, s. 74; see also discussion at page 21.

[22] Submission by E.D. Brown (January 26, 2006) at 3-4.

[23] Submission by R.L. Tyler (November 1, 2005) at 2.

[24] Correspondence with C. Benning, Saskatchewan Registrar of Titles (October 4, 2006).

Even if, as noted above, the land titles registries grant priority to registered interests on the basis of when the applications for registration are initially entered into the system, and not when the registration is complete, applications are not necessarily entered into the system promptly upon receipt, and as a result discrepancies can creep in. Reform of registry procedures to ensure that applications are entered promptly upon receipt, or at least in the order that they are received, would solve some of the problems caused by the registration gap.

RECOMMENDATION 4

The Manitoba Property Registry should take steps to ensure that applications for registration are either entered into the system promptly upon receipt or entered strictly in the order in which they are received.

Under the existing legislation in both Manitoba and Saskatchewan, no compensation is provided for losses caused by the registration gap. In the Commissions' view, the registration gap is in principle a "malfunction" of the registration system, and if the logic employed by the Joint Land Titles Committee[25] is applied, resulting losses should be compensable. Extending coverage to losses that are caused by the registration process chosen by the Registrar seems desirable to the Commissions, and would render both title insurance and the Western Law Societies Conveyancing Protocol less necessary.

RECOMMENDATION 5

Manitoba and Saskatchewan should each amend its legislation to extend compensation scheme coverage to losses that are caused by the registration gap.

As noted above, Manitoba's assurance fund is funded by fees paid to bring land from the registry system into the land titles system. Given that more that 95% of Manitoba land that is eligible for registration has been brought into the land titles system, the future revenue from this source is limited. In order to meet the anticipated costs of expanded coverage and modernization of the assurance fund, the Act should be amended to provide for a more appropriate method of funding. This could be accomplished by a modest increase in the fees paid to register instruments.

RECOMMENDATION 6

Manitoba should amend its legislation to provide for ongoing funding of the assurance fund.

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[25] Joint Land Titles Committee, 1990 at 29.

E. REFORMING THE OVERRIDING INTERESTS EXCEPTION

The Consultation Paper suggested eliminating overriding interests that either should be registered or should not override the register. This was based on the premise that the fewer overriding interests that exist, the more accurately the certificate of title reflects the actual status of title. The Joint Land Titles Committee, for its part, suggested retaining as overriding interests the reservations in Crown grants, tax liens, and short-term leases, but deleting the public highways (which are protected elsewhere), expropriation powers (which are not interests in land), and public and private easements, which in their opinion were not entitled to special protection.[26]

In Saskatchewan, the question of overriding interests was reviewed and examined when the *Land Titles Act, 2000* was being developed. This led to a consolidation and clarification of the interests, but because of the magnitude of other changes that were being made it was not considered practical to make any more substantive changes at that time. While it may be appropriate to re-examine the issues now with a view to eliminating some of the overriding interests (and recording them directly on affected titles), the process could be expected to be massive and costly.[27]

The Commissions are content not to make a specific recommendation regarding overriding interests, but rather to rely on their overarching recommendation, above, that the Joint Land Title Committee's proposals be adopted.

F. EXPANDING THE LAND TITLES SYSTEM INDEMNITY

The Consultation Paper suggested that some of the gaps and weaknesses in the land titles system might be addressed by reducing the barriers to and limits on compensation, expanding the scope of the indemnity to include loss arising from causes other than the operation of the land titles system and the error or misfeasance of the Registrar, and/or replacing the fund with a government-administered insurance scheme. The idea of extending the scope of the indemnity did receive some support from respondents, although any extension would require consideration of where to find any additional funds that might become necessary.[28] Reducing barriers to compensation is dealt with elsewhere in this Report, but the Commissions do not consider that they have sufficient information to make a recommendation with respect to the idea of replacing the assurance funds with government-administered insurance. Such a project would require substantial additional research and investigation that is simply beyond the scope of this Report.

British Columbia has recently broadened the scope of its assurance fund provisions. It has done so by (a) providing for immediate indefeasibility for fee simple interests where the

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[26] Joint Land Titles Committee, 1990 at 26-27.

[27] Submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 5.

[28] See, e.g., submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 3; submission by E.D. Brown (January 26, 2006) at 4.

purchaser is innocent of fraud and purchases in good faith and for valuable consideration, and (b) permitting a claimant to make a claim where the Registrar has made an error even if the claimant was partially responsible for the loss.[29] The first extension, were it to be made in the prairie provinces, would simply codify what is probably already the law.[30] The second is fairly modest in scope, and would once again be compatible in principle with the recommendations of the Joint Land Titles Committee. The Commissions are therefore prepared to endorse similar amendments in Manitoba and Saskatchewan.

More substantial expansion of the scope of the indemnity offered by the compensation scheme, however, would not be compatible with the principle recommended by the Joint Land Titles Committee, that compensation be provided only for malfunctions of the registry system. As with the provision of a government-administered insurance scheme, considerable additional research would be required that is beyond the scope of this Report. The Commissions therefore do not consider such a recommendation is possible at this time. One effect of this, of course, is that title insurance will continue to be useful to the extent that it provides protection against matters that are not covered by the assurance fund.

RECOMMENDATION 7

Manitoba and Saskatchewan should each amend its legislation to:

(a) provide expressly for immediate indefeasibility for fee simple interests where the purchaser is innocent of fraud and purchased in good faith and for valuable consideration; and

(b) permit payment of compensation even where the claimant was partially responsible for the loss.

G. IMPROVING THE RESPONSE TO FRAUD

One of the biggest selling points of title insurance is the peace of mind that it provides to homeowners who are concerned about the effects of fraud, and in particular mortgage fraud. Certainly there has been significant and increasing interest in the issue of fraud and the land titles

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[29] Submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 4; ss. 12-20 of the *Miscellaneous Statutes Amendment Act (No. 2) 2005*, S.B.C. 2005, c. 35 (in force November 24, 2005), which amended the *Land Title Act*, R.S.B.C. 1995, c. 250.

[30] See discussion above at pages 17-18.

system in recent years.[31] Is the incidence of fraudulent transactions sufficient to justify prevention measures and the attendant costs? Are recent examples such as *Jiang*[32] and *CIBC Mortgages Inc.*[33] extraordinary or do they signal the beginning of a disturbing trend?[34] Even if the incidence of fraudulent transactions as a percentage of all transactions continues to be low, the damage caused by even a few transactions is substantial both in terms of the financial loss and in terms of the loss of public confidence in the land titles system. At the same time that we improve security, however, we must not unduly impair the facility of transfer that is such an important part of the land titles system.

1. Restricting Access

One option to reduce the incidence of fraud would be to restrict access to the land titles system to lawyers. This is increasingly a feature of existing land titles systems in any event, as electronic registration is typically restricted to lawyers (and notaries).[35] The Director and Registrar of the Land Title and Survey Authority in British Columbia advises that in 2003 and 2004 seven attempted frauds were detected and thwarted, each of which was committed by a person who had submitted the documents without the assistance of a lawyer or notary. He considers that the

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[31] See, e.g., Canadian Institute of Mortgage Brokers and Lenders Mortgage Industry Task Force, *Canadian Mortgage Industry Fraud: White Paper* (October 26, 2001), online: <http://www.cimbl.ca/download_docs/Canadian%20Mortgage%20Industry%20Fraud%20-%20White%20Paper.pdf> (date accessed: December 14, 2006); N. Siebrasse, "Land Title Conveyancing Practices and Fraud" (Report for the Canada Mortgage and Housing Corporation, December, 2003); Law Society of Upper Canada, *Mortgage Fraud: Report to Convocation* (March 24, 2005), online: <http://www.lsuc.on.ca/news/pdf/convmar05_mortgage_fraud.pdf> (date accessed: December 6, 2006); Government of Alberta Advisory Committee on Mortgage Fraud, *Final Report* (November 14, 2005), online: <http://governmentservices.gov.ab.ca/pdf/MortFraudAdvCte.pdf> (date accessed December 14, 2006); J. Somerset, "Mortgage fraud is sweeping across Canada" (January 12, 2006) *Macleans*, online: <http://www.macleans.ca/topstories/justice/article.jsp?content=20060116_119456_119456> (date accessed: December 14, 2006), J. Melnitzer, "Mortgage Fraud and the Land Titles Act" (February, 2006) *Canadian Lawyer* 37.

[32] *Toronto-Dominion Bank v. Jiang* (2003), 63 O.R. (3d) 764 (S.C.J.).

[33] *CIBC Mortgages Inc. v. Saskatchewan (Registrar of Land Titles)*, [2006] 9 W.W.R. 556 (Q.B.).

[34] Other recent examples of similar frauds include: *Bank of Montreal v. Chan* (2004), 23 R.P.R. (4th) 172 (B.C.S.C.); *CIBC Mortgages Inc. v. Chan* (*sub nom. Household Realty Corp. v. Liu*) (2005), 261 D.L.R. (4th) 679 (Ont. C.A.), aff'g (2004), 20 R.P.R. (4th) 151 (S.C.J.); *Lawrence v. Wright*, [2006] O.J. No. 2907 (S.C.J.); and *Cybernetic Exchange Inc. v. J.C.N. Equities Ltd.* (2003), 15 R.P.R. (4th) 74 (Ont. S.C.J.). Note that the decision in *CIBC Mortgages Inc. v. Chan* was effectively reversed by recent amendments to the Ontario *Land Titles Act*, which established a system of deferred indefeasibility in Ontario: *Ministry of Government Services Consumer Protection and Modernization Act, 2006*, S.O. 2006, c. 34, s. 15.

[35] See, for example, the description of the British Columbia Electronic Filing System, BCLTSA, *Electronic Filing System (EFS)*, online: <http://www.ltsa.ca/ltd_efs_home.htm> (date accessed: December 14, 2006). However, in Saskatchewan anyone may register to access the land titles system electronically.

requirement that a document be witnessed and electronically filed by a lawyer or notary reduces the opportunity for successful title fraud to be committed.[36]

One of the goals of the land titles system was to simplify transactions so that land owners could conduct their own conveyancing transactions. This was an advantage at a time (the mid 19th century) and in places (such as colonial Australia, Manitoba and Saskatchewan) when there were few lawyers available, but this rationale no longer applies in a modern context. In practice, most will retain the services of a lawyer to assist in conveyancing. Does it therefore make sense, given the complexity of such transactions and the potential for fraud, that access to the land titles system be restricted to lawyers?

Objections to a lawyer-mediated process in which the public is denied access to the system are predictable and understandable. Further, as noted above, such a measure will not prevent fraud entirely, as there have been cases of fraud perpetrated by or with the assistance of a lawyer.[37] On balance, the Commissions are not persuaded that the incidence of fraud is such that it justifies restricting access to the land titles system.

2. Improving Detection of Fraud

Fraud by forgery and impersonation could be minimized substantially if there were a foolproof means of confirming identity. Biometric identification technologies,[38] which offer some promise in this regard, are not yet in widespread use, are costly, and may not meet with public approval due to the potential for abuse of such technology. For the time being, attempting to solve the problem by employing such technologies is not a satisfactory solution.

The Registrar could be asked to implement a program to verify signatures and identities, but the cost and delay of such a requirement may well outweigh the savings to be achieved. A system of random audits might be more practical, but could not be expected to catch more than a small percentage of fraudulent transactions.

Another alternative for Manitoba to consider is the detection program implemented in Saskatchewan, in which owners are notified of the registration of a transfer, discharge of

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[36] Submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 4; ss. 42-49 of the B.C. *Land Title Act*, R.S.B.C. 1996, c. 250 set out the officer certification requirements for documents.

[37] The fraud in *CIBC Mortgages Inc. v. Saskatchewan (Registrar of Titles)*, *supra* note 33, offers an example of this latter phenomenon.

[38] Technologies that provide for confirmation of identity by biological or physical characteristics such as facial recognition, retina scan, voice recognition and fingerprint.

mortgage or new mortgage.[39] While it is not without its problems (for example, the very common situation where a registered owner fails to notify the Registry of a change of address), this solution seems sensible to the Commissions, and definitely something that Manitoba's Registrar should implement.

RECOMMENDATION 8

The Manitoba Property Registry should implement a notification program similar to that in place in Saskatchewan.

3. Compensation Fund of First Resort

As a fund of last resort, Manitoba's assurance fund, like Alberta's, may provide an inadequate response to the consequences of fraud. Requiring claimants to exhaust their remedies against the wrongdoer can increase their subjective sense of loss because of the cost, delay, and uncertainty, particularly in cases where it is clear at the outset that recovery from the wrongdoer is impossible.

Saskatchewan and New Brunswick already have in place a system in which an injured innocent party is entitled to compensation immediately from the assurance fund, after which the Registrar has a right of action against the wrongdoer. Such a fund of first resort in Manitoba would result in faster compensation for owners than the current assurance fund system and would, in general, be more efficient, since the Registrar would presumably pursue a wrongdoer only in cases where there was a reasonable chance of recovery. Prompt reimbursement would also minimize the claimant's mental distress and consequential loss.[40] Configuring the assurance fund as a fund of first resort could result in increased costs to the fund, but as the amount of loss is relatively low, such costs could be funded by small increases in user fees. In any event, the current practice of the Registrar is to settle most claims without requiring the claimant to first pursue litigation, so the practical effect would in any event be minimal.

It has been suggested that retaining the fund as a fund of last resort, in conjunction with the availability of title insurance, is preferable to a fund of first resort, as the Registrar would not be placed in the difficult position of being forced to decide whether, in a given case, the claimant

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[39] *The Land Titles Regulations, 2001*, R.R.S. c. L-5.1 Reg. 1, s. 22; Saskatchewan Act, s. 99. In both provinces, the Registrar is able to also lock the register, preventing further dealing with the land. The Saskatchewan notification program was modified in June 2005; notices are now sent to both the old and new address following completion of a change of address, so that owners become aware when a change of address has occurred without their authorization. The fraudster in *CIBC Mortgages Inc. v. Saskatchewan (Registrar of Titles)*, *supra* note 33, had changed the address of the owners before transferring the title in order to prevent the owners from receiving Land Registry notices: submission by C. Benning, Saskatchewan Registrar of Titles (October 27, 2005) at 3-4. The recent amendments in Ontario, the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, S.O. 2006, c. 34, discussed at note 24, ch. 2, also allow notice to be provided to property owners of the registration of instruments affecting their land.

[40] Siebrasse, *supra* note 31 at 9.

colluded in a fraud such that his or her claim should be denied.[41] In light of the fact that the Registrars in both Manitoba and Saskatchewan have the discretion to approve a claim even if the claimant has not first sought compensation from the wrongdoer,[42] and the fact that title insurance will continue to be available, it may be that no change to the existing Manitoba system is necessary. If a *bona fide* claim for compensation is made in either province, the Registrar may reasonably be expected to pay it and, if appropriate, seek indemnification from the wrongdoer.

Nevertheless, the Commissions believe that Manitoba's legislation should be amended to reflect the Registrar's current practice. It does not seem advisable for there to be such disconnect between the legislative scheme and the actual practice of the Registrar.

RECOMMENDATION 9

Manitoba should amend its legislation to provide that the assurance fund is a fund of first resort rather than a fund of last resort.

H. PROTECTING THE SURVEY FABRIC AND LAND MANAGEMENT SYSTEM

Undiscovered and uncorrected survey defects and zoning non-compliance affect not only the owner of land, but the immediate neighbours and the broader community. The Consultation Paper asked whether the Commissions should consider recommending the devotion of greater public resources to survey monument restoration and zoning inspection and enforcement, or recommending that purchasers be required to obtain a current survey and/or building location certificate (or equivalent) as a condition of registration of a transfer. The Consultation Paper also asked whether the land titles registry should be expanded to incorporate survey and zoning registers.

1. Imposing Requirements on Purchasers

One option that the Commissions proffered in the Consultation Paper was the possibility of requiring purchasers to obtain current surveys and/or building location certificates.[43] Another option suggested in response to the Consultation Paper was to recommend permitting municipalities to require that a current zoning memorandum accompany all requests for registration of transfers of real property within their boundaries.[44] This would indirectly require

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[41] Submission by N. Siebrasse (July 20, 2005) at 6.

[42] See discussion above at pages 22-23.

[43] Surveys are effectively required in some states in the United States, including Florida, Ohio, New Mexico and Texas, in that survey coverage is not allowed without a survey: J.L. Gosdin, *Title Insurance: A Comprehensive Overview*, (American Bar Association, 1996) at 1.

[44] Submission by Association of Manitoba Land Surveyors (September 29, 2005) at 4.

purchasers to obtain a building location certificate, as this is a prerequisite to the provision of a zoning memorandum.

The main purpose of any such requirement would be to shift to purchasers the obligation of maintaining the survey fabric and the land management system. The Commissions are concerned about whether it is equitable to shift the burden of maintaining the system in this fashion from the collective shoulders of society as a whole, particularly if the maintenance of those systems is seen as desirable from the point of view of the general community.

As desirable as surveys and building location certificates are from the point of view of purchasers,[45] it is likely that the imposition of such a requirement would meet with strong resistance.[46] As will be discussed in the next chapter, purchasers could be forgiven for preferring the coverage offered by a title insurance policy to the additional cost and possible delay associated with obtaining a survey, building location certificate, and/or zoning memorandum.

Practical problems exist with respect to requiring surveys and/or building location certificates in every residential transaction. For one thing, it is likely that the sudden demand occasioned by the introduction of any such requirement would overwhelm the capacity of the provinces' surveyors. There is, furthermore, an issue regarding copyright; as surveyors hold the copyright in every survey or building location certificate they produce,[47] there may be a reluctance to routinely make those documents available on a public registry, thus greatly simplifying their unauthorized reproduction.[48]

Finally, it does not seem to the Commissions that imposing these responsibilities on residential purchasers is an appropriate or proportionate response to the risks to the survey fabric and land management system that are created by the existence of title insurance, such as they are. Those risks are more properly addressed by an increased commitment on the part of society as a whole to the maintenance of the system. The Commissions hearken back to the comments of the Joint Land Title Committee, which were made in a slightly different context but are nonetheless applicable here:

> If there were no compensation system, persons dealing with land would be likely to take expensive and time-consuming precautions to avoid losses which could, but are not likely to, occur under the system. The social cost of taking such precautions is not justifiable.

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[45] C. Rosenstein, "Title Insurance: Understanding Policy Provisions – U.S. Jurisprudence and a Canadian Alternative (2002) 3 R.P.R. (4th) 214 at 278-283; submission by R.L. Tyler (November 1, 2005) at 2.

[46] *Ibid.* at 285; see also submission by E.D. Brown (January 26, 2006) at 4-5.

[47] See, e.g., *Island View Beach Estates Corp. v. J.E. Anderson & Associates* (2000), 4 C.L.R. (3d) 142 (B.C.S.C.) at paras. 15-16.

[48] This issue may not be insurmountable but consideration would have to be given to copyright issues: submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 4; see also submission by E.D. Brown (January 26, 2006) at 4-5.

It is better to accept the fact that there will be losses and to spread them over all users through a user-funded compensation system.[49]

2. Expanding the Registry

The Consultation Paper asked whether the land titles registry should be expanded to incorporate survey and zoning registers in order to create a better "mirror" of the title to land. Given that the land titles system, which guarantees ownership within the boundaries of land, the survey infrastructure, which determines boundaries of land, and the land use management system, which regulates activity on land, are closely related, it does make sense that they should be integrated in some way, and this option was endorsed by the Registrar General for the Province of Manitoba.[50]

The register currently identifies the registered owner, any mortgages, the existence of claimed interests in the land (leases, easements, and so on), and the legal description of the land. A more comprehensive register would give access to additional information, which might include civic address, site area, and zoning. Ideally, the register would provide a graphic representation of each parcel, with information about the physical characteristics of improvements. Linking to municipal and real estate databases could give access to building permit history, work orders, assessment data, and sales history.

By way of example, Greene County, Ohio has a searchable electronic system in an easy to use, graphic format. It allows for easy search by address, owner, or location and provides, in addition to title and survey information, detailed information about major improvements, property assessment and tax data, and a sales history.[51]

As noted above, British Columbia, Ontario and Quebec have, to some degree, already provided more integrated registers of information affecting land. British Columbia's digital survey plan system allowing for online searching of survey plans[52] and the Integrated Land and Resource Registry[53] is intended to provide online access to information about legal interests in Crown land (*e.g.*, tenures, regulated uses, land and resource use restrictions, and reservations) as well as similar information on private land, where it is available, including graphic descriptions. In Quebec, a searchable cadastral database called "Infolot" provides specific graphic information

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[49] Joint Land Titles Committee, 1990 at 28.

[50] Submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (August 16, 2005) at 4.

[51] Greene County, Ohio, *Greene County Geographic Information Management System*, online: <http://www.co.greene.oh.us/gis/gis_maps.htm> (date accessed: December 15, 2006).

[52] BCLTSA, *Digital Survey Plan (e-Survey) Project*, online: <http://www.ltsa.ca/sgd_dspp_home.htm> (date accessed: December 15, 2006).

[53] B.C. Ministry of Agriculture and Lands, Integrated Land Management Bureau, *Integrated Land and Resource Registry (ILRR)*, online: <http://ilmbwww.gov.bc.ca/ilrr/ILRR.htm> (date accessed: December 15, 2006).

about parcels of land.[54] In Ontario, a "geowarehouse" subscription service offers access to electronic land registration records, including graphic information.[55]

The information described above is already contained in various databases maintained by provincial and professional organizations. Combining or integrating these various databases to provide one register of information relating to land would be a significant improvement to the land titles, survey and land management infrastructure. Although undoubtedly costly to create, it may well be in the public interest, and would provide significant benefits to government, municipalities, property owners, lenders, and others with an interest in land. A number of the problems that have been discussed in this Report could be minimized or resolved by access to more comprehensive and easily accessible information. For example, access to the sales history of a particular parcel might assist in reducing value or flip frauds, and access to a map of the land may assist in identifying major survey defects.

This improvement of the survey infrastructure combined, in Manitoba, with the amendments to *The Real Property Act* proposed by the Joint Land Titles Committee (and endorsed in this Report) would result in a system that is more user-friendly, meets reasonable expectations of the public, and maintains confidence in the land titles system.

Having said that, the creation of any such integrated registry would be both complex and costly. It seems to the Commissions that such a proposal would require in-depth consideration, and is really beyond the scope of a Report that is considering the issue of title insurance and not, strictly speaking, the operation of the land titles registry or the wider land titles system.

RECOMMENDATION 10

Manitoba and Saskatchewan should each consider creating an integrated land records database to provide a broad and comprehensive range of information about land incorporating land use, survey, tax assessment, sales and resource data and information respecting government interests.

3. Committing Greater Resources

As noted above, the Commissions consider that the perceived problems with the survey fabric and the land management system are best dealt with by the commitment of greater public resources, not by shifting the burden onto the shoulders of residential real estate purchasers. The provinces should take a more proactive approach to the protection of the survey fabric.

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[54] Approximately 50% of privately owned land in Quebec is included in the database: Association des Courtiers et Agents Immobiliers du Quebec, *The Quebec Land Registry and Cadastre*, online: <http://www.acaiq.com/cgi-bin/WebObjects/AAVisuel.woa/wa/aller?langue=2&article=5326> (date accessed: December 15, 2006).

[55] Teranet, *Geospacial Solutions: Geowarehouse Technology*, online: <http://www.geowarehouse.ca/> (date accessed: December 15, 2006).

CHAPTER 5

CONSUMER PROTECTION

As was identified in the Introduction, the second of the two areas in which the Commissions are concerned to maintain public confidence in the real property system is the area of consumer protection. The three specific aspects of the original reference that are relevant to this area of concern are:

- The public may be at risk when they deal with title insurers because they may not get independent legal advice when they enter into what is usually the largest financial transaction of their lives;
- The actual product that is being sold may have no value in Manitoba where our land title system already guarantees title; and
- There is no regulation of title insurers, unlike in the United States.

In this chapter, we will review the first concern in some detail. The issue of transaction management services, which many respondents considered much more problematic than title insurance *per se*, will also be discussed. The question of what utility title insurance may have in a jurisdiction like Manitoba or Saskatchewan with a land titles system has already been canvassed, in chapter 3. The issue of appropriate regulation will be discussed within the context of these issues.

A. INDEPENDENT LEGAL ADVICE

For most people, the purchase of real property will be an infrequent event in their lives and there is little reason or opportunity for them to acquire knowledge and expertise about the conveyancing process. While independent legal advice is not mandatory, the complexities and potential pitfalls of the conveyancing process make such advice a practical necessity and we assume that prudent buyers will retain lawyers to assist them. Buyers turn to lawyers to take care of the details, to explain the nature and extent of legal interests, rights and obligations and to make sure that, at the end of the day, they get what they paid for. In addition, buyers need advice on whether title insurance is appropriate in their particular situations.

Critics allege that title insurance and transaction management services threaten consumer access to independent legal advice by reducing the lawyer's role in the transaction, replacing the lawyer altogether, or compromising the lawyer's independence in some way. In considering this claim, it is important to understand the role that independent legal advice is intended to play, regardless of whether that goal is realized in traditional practice and despite the extent to which changes in conveyancing practices have eroded the protection offered by independent legal advice.

1. Significance of Independent Legal Advice

In contract law, parties to a transaction are entitled to pursue their self-interest vigorously, seeking to maximize their benefits and minimize their obligations.[1] Except in very limited circumstances, neither party is under a duty to protect the other or refrain from exercising an advantage to the detriment of the other. For example, the seller knows more about the property than the buyer in virtually every case, but the duty to inform the buyer is limited. The buyer is thus at a disadvantage from the outset. Furthermore, one party may have greater bargaining power and resources than the other. The lawyer's role is to counteract the client's vulnerability and lack of knowledge and protect the client's interest. To accomplish this, the lawyer must be free of any influence or consideration other than the best interest of his or her client.

While the importance of independent legal advice is understood as a key protection of individual liberty against intrusion by the state, it is also necessary in private transactions.

> It is imperative that individuals be able to obtain independent legal advice and representation in order to defend their legal rights against other non-state entities as well as against the state ... [E]ven in a conveyancing transaction, an individual needs to know that the advice and representation he receives will be independent of the influence of the other side, and the existence of a profession which regards independence as a duty is, in my submission, a safeguard which is imperative in the public interest.[2]

2. Access to Independent Legal Advice

(a) Refinancing Transactions

Most refinancing transactions are now completed without the participation of an independent lawyer acting for the borrower. Formerly, the consumer would go to the bank to make an application for a loan. The borrower's lawyer prepared the documents, witnessed the borrower's signature and registered the instruments. Now, once the lender approves the loan, the matter is referred to the service provider who prepares the documents and returns them to the bank for signing.[3] The borrower attends at the branch to execute the documents, which are then registered by the service provider.[4]

The lender does not have a duty to explain the title insurance policy or the service provider's role. The service provider has no relationship with or duty to the borrower. If the

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[1] See, e.g., *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860.

[2] W.H. Hurlburt, *The Self-Regulation of the Legal Profession in Canada and in England and Wales* (2000) at 170.

[3] Today, loan applications are not always made in person. It is now possible to arrange a loan over the Internet or by telephone. While greatly increasing the speed and convenience of loan transactions, this may reduce consumer access to information and also make fraudulent transactions easier to perpetrate and more difficult to detect.

[4] At least one service provider provides an at-home signing service where an employee attends the house to witness the signing of documents. The witness is not a lawyer and no advice is provided to the borrower.

borrower does not seek independent legal advice, there is no one in the transaction that is under any obligation to ensure that the borrower understands the transaction. This is especially problematic where the lender is bundling products and services or offering a variety of loan products. Consumers who rely solely on information provided by the lender may not understand the relative advantages and disadvantages of the products offered and may not understand that such products are not mandatory. Errors are more likely to go undetected. Lastly, consumers may be misled into thinking that they are obliged to buy a product such as title insurance and that there are no other options.

It is of interest that in Ontario, despite the fact that virtually all residential property purchases include the purchase of title insurance by the buyer, "only half of home owners recall that they received title insurance ... [and] ... one-third of home owners don't even know what title insurance is".[5]

(b) Lender Intermediary Programs

Service providers are now seeking to extend their services from refinancing to purchase transactions with the introduction of lender intermediary programs and fixed-price closing services. While such services have not yet appeared in any noticeable way in the western provinces, they have attracted the attention of the Law Society of Upper Canada.[6] Concerns relate to ensuring that lawyers are in a position to exercise independent professional judgment on behalf of clients and are able to avoid conflicts of interest, as the lawyer may have three different entities to whom a duty is owed: the client, the lender and the service provider. Lawyers may be asked to provide confidential client information to the service provider or may feel constrained in their ability to assert the client's position in the event of a dispute or conflict with the service provider or lender.

At one time there was considerable concern among Canadian lawyers that title insurers were attempting to limit or eliminate the role played by lawyers in residential real estate purchases. In 2000 the Canadian Bar Association barred First Canadian Title from sponsoring CBA events or advertising in its magazine because of these fears.

> Among moves that have incensed many real estate lawyers was First Canadian's creation in Ontario and Nova Scotia of "closing centres" which do the bulk of the legal work of a deal, usually limiting lawyers' role to getting the closing documents on the day of the closing, having the client sign the documents, and sending the executed papers back to

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[5] K. Waters, Vice-President of TitlePLUS, quoted in J. Allen, "TitlePLUS launches ad campaign", 26:9 *Lawyers Weekly*, June 30, 2006.

[6] Law Society of Upper Canada, *Notice to the Profession on Use of Third Party Service Providers by Lenders to Process Residential Mortgages* (August 2003), online: <http://www.lsuc.on.ca/news/pdf/aug0503_notice.pdf> (date accessed: December 15, 2006).

the title insurance company with the closing proceeds. However the company shut those centres down years ago.[7]

It appears that these fears have abated. First Canadian Title recently undertook not to open any closing centres anywhere in Canada, and also committed not to lobby for the repeal of Regulation 666 in Ontario (described below).[8] The CBA is presently considering whether, in light of these developments, it should repeal the ban on advertising.[9]

(c) Fixed-Fee Programs

Consumers may be restricted in their choice of lawyers under a fixed-fee program. The service provider gives the consumer the name or names of lawyers who have agreed to provide services for the fixed fee that is lower than the going rate. Consumers may not realize that they are free to retain a lawyer who is not on the list, or they may effectively be discouraged from doing so by the additional cost. Since title insurance is also included in the package, consumers may not question whether title insurance is suitable for them.

Lawyers who participate in a fixed-fee program are independent to the extent that they are not in the direct employ of the service provider, but they may be influenced, directly or indirectly, by considerations other than the best interest of their client, the buyer. For example, the lawyer has an ongoing relationship with the service provider and an interest in maintaining that relationship. Furthermore, the lawyer's role and ability may be restricted where processing functions, such as the drafting of documents, are completed by the service provider or where the lawyer is instructed by the service provider (on behalf of the lender) to perform (or not perform) specified tasks. Will the lawyer have the ability to identify and correct errors or omissions, or will the process determined by the service provider preclude this? Finally, the obligation to provide services at a rate significantly lower than the market rate, which some might suggest is already too low to provide adequate service, may compel the lawyer to find other ways to cut his or her cost. The lawyer may have less time to spend with the client and less direct involvement in the preparation and registration of documents. Thus access to legal advice may be compromised.

(d) Marketing

Since title insurance is marketed directly to lawyers (and lenders, real estate agents and brokers, and mortgage agents and brokers) rather than to the consumer, the latter depends upon the lawyer

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[7] C. Schmitz, "CBA to debate title insurance advertising at Governing Council" 26:14 *Lawyers Weekly*, August 18, 2006.

[8] C. Schmitz, "CBA and title insurer make up for now" 26:15 *Lawyers Weekly*, August 25, 2006.

[9] A resolution at the 2006 CBA Council Annual Meeting to overturn the ban on First Canadian Title Insurance from advertising in any CBA publication was tabled to the February 2007 Mid-Winter Meeting: G. Clarke, "St. John's report" 15:7 *Canadian Bar Association National*, October/November 2006.

(or the lender, agent or broker) to recommend the most suitable product. In marketing their products to lawyers, however, insurers promote the benefits of the product to the lawyer as well as to the client. These benefits include an opportunity for the lawyer to outsource processing and administrative tasks and reduce the lawyer's exposure to liability. As competition for referral business increases, so too does the pressure to offer incentives or referral fees to those in a position to refer business, notwithstanding that such fees are unethical and potentially illegal.[10] Payment of referral fees and incentives drives up the cost for consumers without adding any value to the transaction.

Even without the possibility of improper incentives and referral fees, however, the lawyer's independence may be challenged by the inclusion of protection for the lawyer in the policy or by a waiver of the right of subrogation. In addition to coverage for title and survey defects, the TitlePLUS policy includes "legal services coverage," which provides indemnity for loss arising from the errors and omissions of the lawyer conducting the transaction. In Canada, only LawPRO is licensed to offer legal services coverage, but the other title insurers offer a waiver of their right of subrogation.[11] This waiver is offered in all cases except those involving gross negligence, wilful misconduct or fraud. As a result, the lawyer becomes an indirect insured under the client's policy. This benefit to the lawyer may impact on the lawyer's advice regarding whether title insurance is in the client's interest. Of course, the client also benefits because his or her coverage is not dependent on the future state of the lawyer's "errors and omissions" insurance coverage if the lawyer has retired, left the province, or been the subject of claims that exceed his or her insurance limit.

Legal services coverage and waivers of subrogation provide a direct benefit to lawyers by diverting negligence claims away from the lawyers' own insurer, saving the lawyer's deductible and eventually reducing premiums. In Manitoba, for example, lawyers who are the subject of multiple claims must pay a surcharge in addition to the basic premium for professional liability insurance. The minimization of the financial consequences of negligence for lawyers may remove some of the incentive for careful and diligent practice by lawyers and thus result in more errors. It is reasonable to expect, however, that lawyers who allow their practice standards to slip will cease to be insurable, and will in any event be the subject of an investigation by their Law Society.[12]

The Law Society of Upper Canada has established rules regarding professional obligations with respect to title insurance. These rules include requirements that a lawyer:[13]

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[10] See Law Society of Manitoba, *Code of Professional Conduct*, Chapter 11, Commentaries 9 & 10, online: <http://www.lawsociety.mb.ca/code_and_rules/chapter11.htm> (date accessed December 15, 2006).

[11] That is, a waiver of their right to sue the lawyer on behalf of the insured once they have paid the insured's claim. Unlike the TitlePLUS coverage, a waiver does not protect the lawyer from claims by persons other than the insurer, as for example where a client sues for negligence relating to advice about the agreement of purchase and sale: submission by TitlePLUS (September 23, 2005) at 9.

[12] Joint submission by title insurers at 11.

[13] Law Society of Upper Canada, *Rules of Professional Conduct*, Rules 2.02 (10)-(13) and 5.01(4), online: <http://www.lsuc.on.ca/regulation/a/profconduct/> (date accessed: December 15, 2006).

- advise clients of all reasonable options to assure title, that title insurance is not the only option nor is it mandatory;
- not receive compensation, directly or indirectly, from an insurer, agent or intermediary for recommending a title insurance product, and also advise the client that no compensation was paid;
- if discussing TitlePLUS insurance, fully disclose to the client the relationship between the lawyer, the Law Society of Upper Canada and LawPRO; and
- not permit a non-lawyer to advise the client about title insurance without the lawyer's supervision.

In light of the fact that title insurance will continue to be available in Manitoba and Saskatchewan for the foreseeable future, it would make sense for the Law Societies in both provinces to consider introducing similar provisions in order to protect the interests of consumers who are faced with the option of purchasing title insurance.[14] Such professional obligations would complement the disclosure requirements already enacted by the respective legislatures. Obviously there would be no need for rules relating to LawPRO, since no similar body exists in the prairie provinces.

RECOMMENDATION 11

The Law Societies of Manitoba and Saskatchewan should each introduce rules of professional conduct similar to those adopted by the Law Society of Upper Canada with respect to title insurance, including requirements that lawyers:

(a) advise clients of all reasonable options to assure title, that title insurance is not the only option nor is it mandatory;

(b) not receive compensation, directly or indirectly, from an insurer, agent or intermediary for recommending a title insurance product, and also advise the client that no compensation was paid; and

(c) not permit a non-lawyer to advise the client about title insurance without the lawyer's supervision.

It has been suggested that the manner in which title insurance is distributed may also be problematic. When instructed to obtain title insurance, a lawyer submits an application to the insurer, providing the information the insurer requires. The Law Society of Manitoba has challenged this practice,[15] advising its members of the Insurance Council of Manitoba's opinion

[14] This was recommended by several title insurers: joint submission by title insurers at 31; submission by Stewart Title Guaranty (September 2005) at 16.

[15] Submission by the Law Society of Manitoba (October 6, 2005) at 3-4.

that it breaches the prohibition on acting as an insurance agent without a licence.[16] Lawyers, however, are capable of ordering title insurance policies on behalf of their clients in the course of a real estate transaction.

> An insurance broker, untrained in real estate law, is in no better position than a purchaser to order a policy. The level of training necessary for insurance brokers to allow a title insurer to comfortably underwrite their transactions would be comparable to what a lawyer learns at the bar admission course. Given that title insurance premiums are low (around $200) and are a one time premium, the compensation that could be paid to an insurance broker per transaction would be minimal (perhaps $5-$10). It is doubtful that insurance brokers would find it cost effective to obtain the necessary education and devote significant time per transaction for such a low level of remuneration.[17]

Ontario's insurance legislation permits an exception for lawyers acting as brokers while in their professional capacity.[18] This seems to be a sensible option as long as it is combined with companion practice rules designed to minimize conflicts of interest and undue influence.

The Commissions are persuaded that lawyers are in a better position than insurance brokers to understand the relevant issues and evaluate the needs of the client in the particular circumstances of a given real property purchase transaction. As well, there are a number of different consumers of title insurance (new homeowners, existing homeowners and lenders) and a variety of different distribution channels (lawyers to new homeowners, insurance brokers to existing homeowners, and directly from title insurers to lenders). As such, a one-size-fits-all approach may not be appropriate.

> It is unclear what the risk would be from a lawyer selling a one-time $200 policy to their client or a lender purchasing a one-time policy on a mortgage finance from a title insurer.[19]

Lawyers should be permitted to apply for title insurance on behalf of their clients, and, in accordance with their existing professional obligations, should familiarize themselves with the terms of any title insurance policy and explain them to the client before the policy is issued.[20] It was suggested that lawyers should be allowed to arrange title insurance provided that they receive compensation only from their clients, and not from the title insurers directly,[21] but the

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[16] *Ibid.*; *The Insurance Act*, C.C.S.M., c. 140, s. 369(1). See also Law Society of Manitoba, *Law Society Practice Notices, Re: Restricted Lawyer Involvement in Title-Insured Conveyances*, online: <http://www.lawsociety.mb.ca/notice_lsm_conveyance.htm> (date accessed: December 15, 2006).

[17] Submission by Stewart Title Guaranty (September 28, 2005) at 18.

[18] *Registered Insurance Brokers Act*, R.S.O. 1990, c. R.19, s. 2(2)(a).

[19] Joint submission by title insurers at 37.

[20] Submission by E.D. Brown (January 26, 2006) at 1. R.L. Tyler was also unable to see any reason why lawyers should not be permitted to arrange title insurance: submission by R.L. Tyler (November 1, 2005) at 2.

[21] Submission by the Association of Manitoba Land Surveyors (September 29, 2005) at 4.

payment of referral fees from insurers to lenders and lawyers is already prohibited by banking and insurance legislation and by professional codes of conduct, rendering further regulation unnecessary.

RECOMMENDATION 12

Manitoba and Saskatchewan should each amend the appropriate insurance legislation to provide that lawyers are entitled to arrange title insurance on behalf of their clients.

3. Regulation 666 as a Solution

Should consumers be required to obtain independent legal advice for title insured transactions? It is not a requirement for other forms of insurance, or for uninsured real estate transactions. In order to make an informed decision about whether to obtain title insurance, however, the consumer needs to understand the terms and limitations of the policy and the other options available to assure title. Title insurance policies are complex and the average consumer will have difficulty making an informed decision without specialized knowledge or expertise. On the other hand, if doing so will significantly increase the cost of the transaction, most consumers can be expected to resist such a requirement.[22]

It has been suggested that Ontario's Regulation 666 ensures access to independent legal advice. That regulation requires that a title insurer obtain a certificate of title prepared by an independent lawyer before issuing a policy.[23] The regulation was made in 1957 to prevent the unauthorized practice of law by title insurers.[24] In the early 1990s title insurers sought, unsuccessfully, to have the independent solicitor requirement repealed so that they could perform more work in-house. Is the regulation, in its current form, sufficient to ensure independent advice for consumers?

Strictly speaking, the provision of title insurance does not affect in any way the availability of independent legal advice.[25] If there is to be regulation, it should be directed at third party conveyancing practices, not title insurance *per se*.[26] Furthermore, the relevance of

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[22] Submission by E.D. Brown (January 26, 2006) at 3.

[23] *Classes of Insurance*, R.R.O. 1990, Reg. 666, s. 3.

[24] S.H. Troister & K.A. Waters, *Real Estate Conveyancing in Ontario: A Nineties Perspective* (Lawyers Professional Indemnity Company, 1996) at 99.

[25] Joint submission by title insurers at 36.

[26] Submission by TitlePLUS (September 23, 2005) at 6; submission by Stewart Title Guaranty (September 28, 2005) at 12.

Regulation 666 in a land titles system is questionable, as title to the property is certified by the system, and not (as in an old-style registry system) by the lawyer.

In any event, all that Regulation 666 does is require the insurer to obtain a certificate of title from a lawyer who is not employed by the insurer; it does not directly ensure that the buyer obtains independent, or any, legal advice. The Law Society of Manitoba, in its submission, suggested that adopting a regulation similar to Regulation 666 "may be of little value".[27]

In light of these facts, the Commissions are not persuaded that regulation similar to Ontario's Regulation 666 is either necessary or desirable.

B. TRANSACTION MANAGEMENT SERVICES

An area of concern closely related to the question of independent legal advice that, while not an inevitable result of title insurance, has become closely identified with it, is transaction management services. These services involve the "bundling" of various services related to the conveyancing process, and are offered by at least two of the title insurers operating in Canada. A number of respondents saw the issues arising out of these services as much more problematic than the issue of title insurance *per se*.[28]

Increasingly, lenders are cross-marketing other financial products and services to their mortgage customers; some 50% will also obtain a line of credit, credit card or life insurance along with their mortgage.[29] Some lenders may also be promoting fixed-fee transaction management packages offered by third party service providers. The package includes all services, including legal services, required to complete the transaction and a title insurance policy for both lender and owner. Consumers of the services are provided with the names of lawyers who have agreed to participate in the fixed-fee program.

The Law Society of Upper Canada has identified a number of consumer concerns about these programs:

- consumers may not be properly informed and may not be aware that a third party service provider is involved;
- consumer choice of title insurer and lawyer may be restricted;

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[27] Submission by the Law Society of Manitoba (October 6, 2005) at 5.

[28] This is certainly the view of the British Columbia lawyers who instigated an investigation by a Law Society task force into title insurance: P. Shrimpton and R. Morn, "Mortgage Outsourcing and Its Impact on Real Estate Practitioners" CBA-BC *BarTalk* (April 2006) 22.

[29] Law Society of Upper Canada, *Submission to the Parliamentary Assistant, Ministry of Financing, on Improving the Mortgage Brokers Act: A Consultation Paper* (September 2004) at 2, citing a 2003 mortgage consumer survey conducted by Canada Mortgage and Housing Corporation for the Canadian Institute of Mortgage Brokers and Lenders (CIMBL), online: <http://www.lsuc.on.ca/news/pdf/oct0704_brokers_submissions.pdf> (date accessed: December 15, 2006).

- consumers may face higher fees than if they were to choose another insurer and may also face hidden fees;
- mortgage advances may be at risk as third party service providers are not subject to the same protections that apply to financial institutions. Consumers are not protected from the provider's insolvency and may lose the funds;
- bundling of title insurance with other services may constitute improper tied selling; and
- lawyers may be placed in a conflict in which they are unable to act in their clients' best interests or may be prevented from properly explaining or disclosing the breakdown of the fee. Lawyers may also be required to disclose confidential client information to the third party.[30]

If the trend of bundling of financial products and services related to real property transactions continues, we can expect to see greater consumer participation in such programs. This bundling of financial products and services appears to be permitted in Canada as long as it is available to all consumers, consumers continue to have choice in products and services, there is benefit to consumers, and the lender does not engage in tied selling in which the availability of one product is conditional upon the purchase of another.

The structure of title insurers in Canada also raises concerns about tied selling. First Canadian is currently the largest title insurer in Canada and the only provider that also offers transaction management services in addition to or in conjunction with its title insurance product. Other insurers have formed alliances with transaction management service providers. Chicago Title is partnered with sister company, Fidelity National Financial, to offer title insurance to consumers of the latter's transaction management services. The bundling together of title insurance and other conveyancing services has raised concern about tied selling and conflicts of interest.

No one has suggested that lenders or title insurers coerce consumers into obtaining a title insurance policy, but the bundling of insurance with other services may mislead consumers. Consumers may think that they are obliged to buy title insurance or that there are no better or more cost-effective options.

In the Consultation Paper the Commissions noted that tied selling is expressly prohibited by the *Competition Act*, but asked whether perhaps industry-specific legislation was needed.[31] No respondent suggested that such legislation was necessary, and the Commissions do not consider that additional legislation is necessary to deal with concerns relating to tied selling. Some of the other issues raised by the bundling of title insurance with transaction management services may, however, require regulation.

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[30] Law Society of Upper Canada, *Law Society warns lawyers about mortgage programs* (August 6, 2003), online: <http://www.lsuc.on.ca/news/pdf/aug0503_mortgage.pdf> (date accessed: December 15, 2006).

[31] *Competition Act*, R.S.C. 1985, c. C-34, s. 77; see also the Canadian Council of Insurance Regulators, *Consultation Paper: Issues Related to Inducements, Rebating and Tied Selling* (March 2004), online: <http://www.ccir-ccrra.org/CCIR/publications/MC%20Discussion%20Paper%20EN%20Mar%2004.pdf> (date accessed: December 15, 2006).

There is presently little or no regulation of transaction management services provided by non-lawyers, and no regulation of the bundling of such services together with title insurance. The Rules of the Law Society of Upper Canada, discussed in above, provide guidance to Ontario lawyers for advising clients in title insured transactions and may, as noted, be a useful addition to the law society rules in Manitoba and Saskatchewan. While these rules might afford useful guidance to lawyers, however, they will have little impact on lenders and service providers who are not lawyers.

As noted above, legal profession statutes in both Manitoba and Saskatchewan restrict the conduct of real estate transactions to lawyers.[32] The conduct of real estate transactions by lawyers is regulated by minimum practice standards in the form of rules, notices to the profession, and checklists, all of which are intended to provide guidance to lawyers and protect the public by creating checks and balances for the conveyancing system. Increasingly, however, both in Manitoba and Saskatchewan and elsewhere in Canada, the preparation of documentation relating to real estate transactions is being done by non-lawyers, whether directly supervised by lawyers or not.[33] Given that the Law Societies of Manitoba and Saskatchewan have the power to investigate and prosecute or enjoin the unauthorized practice of law, there appears to be no need for legislative reform to address this problem.[34]

We are unaware of any Canadian guidelines or regulations that apply specifically to the provision of transaction management services by third party service providers. In the United States, the provision of transaction management services in transactions involving a federally regulated mortgage is regulated by the *Real Estate Settlement Procedures Act* ("RESPA"), referred to in chapter 3 above.[35] The RESPA is consumer protection legislation intended to "help consumers become better shoppers for settlement services,"[36] and to eliminate kickbacks and referral fees that increase the cost of settlement services. It achieves its object by means of detailed and extensive disclosure requirements imposed on lenders and others who provide settlement services.

The disclosure required by the RESPA includes information about various settlement services, an estimate of settlement costs, information about whether the lender intends to service the loan or transfer it to another lender, and information about complaint resolution mechanisms.[37]

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[32] *The Legal Profession Act*, C.C.S.M., c. L107, s. 20; *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1, s. 30.

[33] The Law Society of British Columbia recently decried this practice: Law Society of British Columbia, "AGM passes resolutions to counter poor mortgage practices" 2005:4 *Benchers' Bulletin*, September-October 2005.

[34] *The Legal Profession Act*, C.C.S.M., c. 407, Divisions 7-10; *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1, Part IV and ss. 80-82.

[35] *Real Estate Settlement Procedures Act*, 12 U.S.C., ss. 2601–2617.

[36] United States Department of Housing and Urban Development, *More Information About RESPA*, online: <http://www.hud.gov/offices/hsg/sfh/res/respamor.cfm> (date accessed: December 15, 2006).

[37] *Ibid.*

Since title insurers depend upon referrals or selection by conveyancing service providers, competition for those referrals is intense. The payment of referral fees and kickbacks is a significant issue in the United States, with prosecutions netting multi-million dollar fines against title insurers.[38] The RESPA prohibits the payment or acceptance of a fee, kickback or incentive for referral of settlement services involving a federally related mortgage. It also prohibits the practice of fee splitting and the receipt of fees for services not actually performed.

To avoid the prohibitions against referral fees, some American title insurers have entered into controlled or affiliated business arrangements with conveyancing service providers such as real estate agents, escrow agents and others who might refer buyers to the title insurer.[39] The RESPA regulates such arrangements and requires that service providers disclose them to consumers when referring the latter to other providers in which they have an interest. The disclosure must take place before the referral, describe the business arrangement and provide an estimate of the settlement costs. The referring provider cannot require that the consumer use the referred provider unless the latter provider will be representing the lender's interest in the transaction.[40]

The RESPA also prohibits a seller from requiring the buyer, as a condition of the contract of sale, to obtain title insurance from a particular company. The remedy is a right of action for three times the title insurance charges.[41]

There are significant differences between the title insurance industries in the United States and Canada, which may justify different regulatory regimes. At present, in Canada, there is no regulation of conveyancing services and very little regulation that is specific to title insurance. The federal *Bank Act* and its regulations do prohibit banks from requiring or recommending that a borrower use a particular title insurance company,[42] and recent provincial legislation imposes a similar restriction on credit grantors.[43] The recent amendments to

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[38] See "How vulnerable are AfBA's? Local plaintiff's attorney goes after Minnesota "sham" title companies" *The Legal Description* (February 19, 2001), online: <http://www.abraxis.com/roxanna/pdf/TLD_2_19_01.pdf> (date accessed: December 15, 2006); US Department of Housing and Urban Development, *HUD Announces Settlements in Kickback Scheme Involving Oklahoma Real Estate Agents, Home Builders and Title Companies* (March 21, 2005), online: <http://www.hud.gov/news/release.cfm?content=pr05-032.cfm> (date accessed: December 14, 2006); American Land Title Association, *California title insurance anti-kick-back bill passes committee* (May 1, 2005), online: <http://www.alta.org/indynews/news.cfm?newsID=2758> (date accessed: December 14, 2006).

[39] Such arrangements are prohibited when the affiliate is not a legitimate service provider but rather a "sham" company primarily established to facilitate the payment of a fee or commission to the affiliate in exchange for a referral of business and where no service of value is provided to the consumer.

[40] United States Department of Housing and Urban Development, *supra* note 38.

[41] *Ibid.*

[42] S.C. 1991, c. 46, s. 416; *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330; submission by Law Society of Manitoba (October 6, 2005) at 4.

[43] See for example *The Consumer Protection Amendment Act (Cost of Credit Disclosure and Miscellaneous Amendments)*, S.M. 2005, c. 16, s.21; *The Cost of Credit Disclosure Act, 2002*, S.S. 2002, c. C-41.01, s. 15.

consumer protection legislation in Manitoba and the new legislation in Saskatchewan also require lenders to advise borrowers in writing that any insurance that the lender requires the borrower to purchase in conjunction with the transaction may be purchased from any appropriate insurer,[44] but in Saskatchewan at least, the requirement for written notice only applies to insurance that the lender requires, not insurance (such as title insurance) that it may simply suggest or recommend.[45]

The RESPA provides for extensive and detailed disclosure by suppliers of title insurance. At some point, however, the complexity and breadth of disclosure can obscure rather than clarify the decision-making process. If the provision of additional information about title insurance were to be required by legislation, what type of information should be disclosed, in what manner and by whom? The Commissions consider that in order to address the concerns raised about the consumer's ability to make an informed choice, the following disclosure would be helpful:

- a clear statement that title insurance is not mandatory and that there is no obligation to purchase the offered product;
- information on existing forms of protection (land titles system, Protocol, etc.);
- an explanation of the relationship between the insurer and the lender or the person who is promoting the product, and any direct or indirect benefit provided to that person;
- information about the various means of assuring title, including traditional due diligence performed by an independent lawyer; and
- an explanation and breakdown of the fee payable for title insurance and any "bundled" services.

Such disclosure should also help to address concerns about tied selling and bundling of title insurance with other products and services, even though mere disclosure may not be sufficient to prevent all improper practices.

RECOMMENDATION 13

Manitoba and Saskatchewan should each amend the appropriate consumer protection legislation to require lenders who are requiring or recommending title insurance to mortgagors, whether or not "bundled" with transaction management services, to provide the mortgagor with the following information:

(a) a statement that title insurance is not mandatory;

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[44] *Ibid.*

[45] *Ibid.*; both Acts provide that a borrower who is required to purchase insurance may do so from an insurer of his or her choice, subject to the lender's disapproval on reasonable grounds. Both Acts also require a lender who offers to provide or arrange insurance for a borrower to notify the borrower in writing of the borrower's right to choose the insurer; in Saskatchewan this requirement applies to insurance required by the lender, while in Manitoba the notification requirement arguably applies to any mandatory or optional insurance that the lender offers to provide or arrange.

(b) other methods of assuring title that are available in the absence of title insurance;

(c) the relationship between the lender and the title insurer and any direct or indirect benefits the lender is being provided in return for offering the service in question; and

(d) a breakdown of the fees payable for title insurance and any "bundled" services.

Who is responsible for the enforcement of such regulations? This item may not fall under the insurance regulator's jurisdiction, nor would the relevant law societies have authority over the service provider, who is not a lawyer. Most likely such oversight should be the responsibility of a governmental agency with responsibility for administering consumer protection legislation. In Manitoba this is the Consumers' Bureau within the Department of Finance; in Saskatchewan, the Consumer Protection Branch within the Department of Justice.

Another of the concerns raised regarding transaction management services has been the allegedly inferior quality of the document preparation done by non-lawyers.[46] Lawyers' competence in such matters is, of course, regulated by their governing law society, which also insures lawyers' clients against the effects of negligent practices. It would seem prudent to provide some form of comparable regulation of third party service providers, in order to encourage appropriate care and diligence. Perhaps the most efficient method of accomplishing this goal is to require title insurers to include a term in every residential policy providing coverage for any loss suffered as a result of an error or omission in a document submitted for registration at the land titles office by a third party service provider.

RECOMMENDATION 14

Manitoba and Saskatchewan should each amend the appropriate insurance legislation to require title insurers to include in every residential policy a term insuring against losses suffered as a result of an error or omission in a document prepared by a third party service provider and submitted for registration to a land titles office.

C. BUYER BEWARE

Many lenders have relaxed or removed their requirement for an up-to-date survey and have accepted title insurance instead. Since the lender no longer requires a survey, it is up to the buyer to decide whether he or she will require one. Notwithstanding the benefits, given the cost of obtaining a survey, a buyer may well decide to forego it, or opt for a title insurance policy instead.

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[46] See e.g., submission by I.C.B. Smith, Director and Registrar, BCLTSA (November 8, 2005) at 3 and 5; submission by R.M. Wilson, Registrar General and Chief Operating Officer, Manitoba Property Registry (November 15, 2005) at 5; Law Society of British Columbia, *supra* note 33.

This trend away from pre-closing surveys could ultimately affect private interests because the buyer loses the opportunity to discover and avoid the consequences of a survey defect. Critics of title insurance suggest that insurers over-emphasize the cost benefits and downplay the consequences of a survey defect. Consumers should understand the range of possible consequences and the express and implied limits of insurance coverage. Unless these are properly explained to the consumer, the choice to forego a survey may not be truly informed, since the consumer is likely to give greater weight to the immediate cost savings than to the somewhat intangible benefits of a survey.

What options might exist to assist consumers in making a truly informed decision when faced with a choice between obtaining a survey and purchasing title insurance? The first and obvious option is ensuring that the buyer receives appropriate and independent legal advice; this has already been addressed above. Another option might be requiring vendors to provide more information about their property than is presently required.

As noted in chapter 2, the doctrine of *caveat emptor* ("buyer beware") applies to residential real property purchases, and has only been attenuated modestly by the use of statutory "offer to purchase" forms. The Consultation Paper asked whether Manitoba and Saskatchewan should consider following the examples of England and Wales, Denmark, and Australia by legislatively dispensing with the doctrines of *caveat emptor* and requiring vendors to supply prospective buyers with an extensive information package including, *inter alia*, a survey, title information, tax information, and existing warranties or guarantees.[47] The purpose of doing so would be to reduce the likelihood that buyers of residential real property will suffer nasty surprises after taking possession, and incidentally to reduce the need for title insurance.

The statutory requirement for "Home Information Packs" ("HIPs") was introduced in England and Wales in 2004, following public consultation, although vendors will not actually be required to provide HIPs until 2007.[48] Regulations made in June, 2006 stipulate the contents of the HIPs. HIPs are required to include an index, a sale statement containing the terms of sale, evidence of title, standard local authority and drainage and water searches, an Energy Performance Certificate and, where appropriate, commonhold or leasehold information, a New Homes Warranty or a report on a home that is not physically complete. The regulations also require sellers to provide a Home Condition Report carried out by a certified home inspector, but the government announced in July, 2006 that the regulations will be amended to make the Reports a voluntary component of the HIPs for the time being, along with guarantees and

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[47] *Housing Act 2004* (U.K.), c. 34, Part 5 – Home Information Packs; see also W. Wilson, *The Housing Bill: Bill 11 of 2003-04* (House of Commons Research Paper 04/02, 2004), online: <http://www.parliament.uk/commons/lib/research/rp2004/rp04-002.pdf> (date accessed: December 14, 2006).

[48] Office of the Deputy Prime Minister, *Reforming the Home Buying and Selling Process in England and Wales: Contents of the Home Information Pack: A Consultation Paper* (2003), online: <http://www.communities.gov.uk/pub/151/ContentsoftheHomeInformationPackaconsultationpaperPDF3247Kb_id1151151.pdf> (date accessed: December 14, 2006); see also Communities and Local Government (U.K.), *The key to easier home buying and selling: consultation paper and summary of responses* (1999), online: <http://www.communities.gov.uk/index.asp?id=1502887> (date accessed: December 14, 2006).

warranties and other searches.[49] Though there has been criticism of the proposed system, the government asserts that it has strong consumer support due to the increased certainty it gives to home buyers.[50]

The Danish system of housing market transactions has evolved over the past couple of decades to require vendors to put together a range of standardized information about a property before it may be put on the market. The key items of information are Land Registry information, local authority searches, a report on energy performance, and (for houses only) a survey report on the condition of the property. The survey report is prepared by a qualified surveyor and identifies any observable problems, and costs between $700 and $1200 depending on the age and condition of the property. The survey report itself is not mandatory, but relieves the vendor from liability that would otherwise exist for defects that are not disclosed to the buyer.[51]

Several Australian jurisdictions, including New South Wales, Victoria, South Australia, and the Australian Capital Territory, require pre-sale disclosure of information by a vendor of residential real property.[52] The purposes of requiring this disclosure are said to include:

- to ensure that purchasers possess more information about the property prior to purchase in order to reduce the imbalance in bargaining power between the parties;
- to ensure (given the complexity of modern residential realty, and the innumerable Federal, State and Local government restrictions that may attach to a title) disclosure of matters that may impact on the decision to purchase residential property, so that purchasers can make informed decisions;
- to recognise that the magnitude of the obligations associated with home ownership 'may not be fully realised until subsequent reflection free from the blandishments of the real estate agent';[53] and

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[49] *Home Information Pack Regulations 2006* (U.K.), Part 3; U.K. Communities and Local Government, *Regulations*, online: <http://www.communities.gov.uk/index.asp?id=1500728> (date accessed: December 14, 2006).

[50] Wilson, *supra* note 47 at 61. The Council of Mortgage Lenders is one organization that has raised concerns: see aboutproperty.co.uk, *Property News: HIPs a "costly indulgence"* (October 27, 2006); on the other hand the article notes that the majority of people who attended a panel discussion would prefer to buy a house with a Home Information Pack.

[51] Office of the Deputy Prime Minister, *101: Home buying and selling in Denmark and New South Wales*, online: <http://www.odpm.gov.uk/index.asp?id=1155820> (date accessed: December 14, 2006).

[52] Tasmania Law Reform Institute, *Vendor Disclosure* (Report #5, 2004) at 12-16, online: <http://www.austlii.edu.au/au/other/taslri/reports/2004/1.pdf> (date accessed: December 14, 2006); *Conveyancing Act 1919* (NSW), s. 52A(2)(a); *Conveyancing (Sale of Land) Regulation 2005* (NSW), cl. 4; *Sale of Land Act 1962* (Vic), s. 32; *Civil Law (Sale of Residential Property) Act 2003* (ACT), s. 9; *Land and Business (Sale and Conveyancing) Act 1994* (SA), s. 7; *Land and Business (Sale and Conveyancing) Regulations 1995* (SA), cl. 7-8.

[53] A.J. Bradbrook, S.V. MacCallum and A.P. Moore, *Australian Real Property Law*, 2d ed. (1997) at para. 5.69, cited in Tasmania Law Reform Institute, *supra* note 52 at 12.

- to recognise that, in many instances, the vendor is in a better position to provide information about the property than the purchaser is to discover it.[54]

While real estate conveyancing practices in the countries that have introduced vendor disclosure differ from those in Canada,[55] the Commissions consider that the concept of requiring extensive disclosure by vendors has merit. It is beyond the scope of this Report, however, to consider in detail the implications of such a requirement. Further study and consideration is desirable.

RECOMMENDATION 15

Manitoba and Saskatchewan should each undertake further study with respect to the concept of requiring vendors of residential real property to provide potential purchasers with extensive disclosure.

D. OVERCHARGING

Some critics of title insurance have identified premiums and referral fees as potential sources of concern. These critics allege that premiums are unreasonable because only about 10% of the premium revenue is paid out in claims, hence demonstrating that premiums are excessive in relation to the risk insured.[56] In actuality, as suggested by title insurers and noted above, recent Canadian experience overall seems to be that claims account for slightly more than 20% of premium revenue, which is approximately four to five times higher than the recent experience in the United States.[57] In light of the structure of the title insurance industry, which is qualitatively different from most insurance industries, this ratio may not be a concern; title insurers must incur

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[54] Tasmania Law Reform Institute, *supra* note 52 at 12.

[55] For example, the occurrence of 'gazumping' and 'gazundering' has caused significant concern. In these jurisdictions, although an offer may be accepted and a buyer's deposit paid, there is no binding agreement until the exchange of contracts, which is carried out after the buyer has completed the appropriate searches and inspections. This 'subject to contract' phase takes on average 8 - 9 weeks in England and Wales, and in the meantime, the seller is free to accept another offer, and is not obligated to compensate the buyer for his or her costs. This is known as 'gazumping'. In a slow market, the opposite may occur; 'gazundering' takes place when the buyer withdraws his or her offer. One of the stated purposes of vendor disclosure requirements is to shorten the 'subject to contract' phase so that the occurrence of gazumping and gazundering is reduced: see Communities and Local Government (U.K.), *The key to easier home buying and selling: consultation paper* at paras. 9-12, online: <http://www.communities.gov.uk/index.asp?id=1151097#P106_17938> (date accessed: December 14, 2006); NSW Office of Fair Trading, *Real Estate and Renting Services: Gazumping*, online: <http://www.fairtrading.nsw.gov.au/realestaterenting/buyingselling/gazumping.html> (date accessed: December 14, 2006); J. Kelly, "Gazumping Sweeps Britain", *The Observer*, April 14, 2002, online: <http://observer.guardian.co.uk/uk_news/story/0,,684075,00.html> (date accessed: December 14, 2006).

[56] B. Ziff, "Title Insurance: The Big Print Giveth but Does the Small Print Taketh Away?" in D. Grinlinton, ed., *Torrens in the Twenty-First Century* (2003) at 394-95; Professor Ziff notes that in Alberta in 2000, First American received just over $2.24 million in premiums and paid out $146,000 in claims and related expenses.

[57] Joint submission by title insurers at 15-19.

greater up-front expenses than "typical" insurers, for example, and premium income is highly dependent on real estate sales and mortgage refinancing activity.[58]

It has been suggested that relying on the marketplace to regulate premiums is ineffective because such competition is "frequently illusory because of infrequent issuance of a policy and reverse competition for referral of business."[59]

> Due to the purchaser's nonparticipation in the selection of a title insurer, the market is an ineffective control on the industry, and the demand for owner's title insurance does not change significantly with changes in policy prices. When the purchase of title insurance becomes an integral step in real estate transactions, as it has in most states, consumer demand becomes highly inelastic, and the effectiveness of price competitiveness between sellers diminishes entirely.[60]

This argument was described by Professor Siebrasse in his submission to the Commissions as "simply wrong":

> Price competition among suppliers is completely unrelated to elasticity of consumer demand. Price competition depends only on the structure of the supply market; so long as the market is competitive, the product will be delivered at marginal cost.... This is because even if consumer demand for *title insurance* is highly inelastic, consumer demand for title insurance *from a particular insurer* may nonetheless be extremely elastic.[61]

Typically, policies are not marketed directly to consumers, but rather to service providers such as lawyers, lenders, mortgage brokers and realtors. This focus arguably increases the potential for improper referral fees and incentives paid to service providers in exchange for referrals. The payment of referral fees and incentives in the United States has driven up the cost without adding significant benefit to the consumer.

> [T]he companies' competitive efforts have been channelled toward those individuals or institutions who would be advising the purchaser at the closing stages of the transaction: the brokers, the bankers, and the attorneys. The result is a system of "reverse competition" whereby the insurance companies compete for the recommendations of real estate professionals rather than for the business of the actual consumer. "Reverse competition" has often taken the form of payments to the real estate professional, in the form of rebates, commissions, fees, or kickbacks, and are *far in excess* of the payment justified by the work performed. As a result, the consumer pays a much higher premium that he would pay in a purely competitive situation.[62]

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[58] Joint submission by title insurers at 15-19; see also submission by N. Siebrasse (July 20, 2005) at 8-11.

[59] J.L. Gosdin, *Title Insurance: A Comprehensive Overview*, (American Bar Association, 1996) at 2.

[60] D.J. Cook, "Iowa's Prohibition of Title Insurance — Leadership or Folly?" (1983-84) 33 Drake L. Rev. 683 at 695.

[61] Submission by N. Siebrasse (July 20, 2005) at 9 [emphasis in original].

[62] Cook, *supra* note 60 at 696 [emphasis in original].

As noted above, the payment of referral fees from insurers to lenders and lawyers is already prohibited by banking and insurance legislation and by professional codes of conduct. However, critics allege that it is possible for insurers to disguise such fees or incentives as service fees or other charges. In the past it has been difficult to discover when such fees are paid, as there was no requirement that insurers and service providers furnish consumers with a detailed breakdown of the fees and premiums charged. This has changed in both Manitoba and Saskatchewan as a result of the new consumer credit disclosure requirements.[63] The joint submission by four title insurers operating in Canada expressed complete agreement with the suggestion that all costs associated with title insurance policies should be disclosed to consumers.[64]

Of course it is also possible that, as Professor Siebrasse has argued, referral fees are not problematic from the point of view of the consumer, since as long as the market for real estate lawyers is competitive the overall cost to the consumer will not change; what would be more helpful from the consumer's point of view would merely be the transparency available from the bundling of services so that the consumer is aware going into the transaction of the total cost.[65]

In considering whether premiums should be regulated, the difference between Canadian and American conveyancing practice should be noted. Title insurance premiums in the United States are significantly higher than in Canada because of commissions paid to agents and the role that the insurer and its agents play in the conveyancing process. In some jurisdictions, the commission paid to the title agent may represent 80% of the premium charged.[66] Secondly, underwriting costs, which relate to the examination of title, correction of defects and searches are considerably higher than in Canadian jurisdictions. American land registries are weak compared to those in Canada and title insurers must maintain significant land records, some of which operate as a *de facto* land registry. Maintenance of these records, called title plants, is a significant underwriting expense which Canadian title insurers do not have to incur.

Overall, and given the recent amendments to the relevant legislation in both Manitoba and Saskatchewan, the Commissions do not consider that additional regulation of title insurance premiums is necessary to protect consumers.

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[63] *The Consumer Protection Amendment Act (Cost of Credit Disclosure and Miscellaneous Amendments)*, S.M. 2005, c. 16, s. 21; *Cost of Credit Disclosure Act, 2002*, s. 15.

[64] Joint submission by title insurers at 19.

[65] Submission by N. Siebrasse (July 20, 2005) at 11-12.

[66] N.R. Lipshutz, *The Regulatory Economics of Title Insurance* (1994) at 37.

CHAPTER 6

LIST OF RECOMMENDATIONS

1. Manitoba and Saskatchewan should each implement the recommendations of the Joint Land Titles Committee made in 1990 and 1993. (p. 47)

2. Manitoba should amend its legislation to require interest holders to discharge registered interests within 30 days after the interests cease to exist, failing which they would be subject to a fine and required to make compensation for any resultant losses. Saskatchewan should amend its legislation to add the requirement for compensation. (p. 48)

3. Manitoba and Saskatchewan should each amend its legislation expressly to confer priority on registered interests according to their initial entry rather than according to when their registration is complete. (p. 48)

4. The Manitoba Property Registry should take steps to ensure that applications for registration are either entered into the system promptly upon receipt or entered strictly in the order in which they are received. (p. 49)

5. Manitoba and Saskatchewan should each amend its legislation to extend compensation scheme coverage to losses that are caused by the registration gap. (p. 49)

6. Manitoba should amend its legislation to provide for ongoing funding of the assurance fund. (p. 49)

7. Manitoba and Saskatchewan should each amend its legislation to:
   (a) provide expressly for immediate indefeasibility for fee simple interests where the purchaser is innocent of fraud and purchased in good faith and for valuable consideration; and
   (b) permit payment of compensation even where the claimant was partially responsible for the loss. (p. 51)

8. The Manitoba Property Registry should implement a notification program similar to that in place in Saskatchewan. (p. 54)

9. Manitoba should amend its legislation to provide that the assurance fund is a fund of first resort rather than a fund of last resort. (p. 55)

10. Manitoba and Saskatchewan should each consider creating an integrated land records database to provide a broad and comprehensive range of information about land incorporating land use, survey, tax assessment, sales and resource data and information respecting government interests. (p. 58)

11. The Law Societies of Manitoba and Saskatchewan should each introduce rules of professional conduct similar to those adopted by the Law Society of Upper Canada with respect to title insurance, including requirements that lawyers:
    (a) advise clients of all reasonable options to assure title, that title insurance is not the only option nor is it mandatory;
    (b) not receive compensation, directly or indirectly, from an insurer, agent or intermediary for recommending a title insurance product, and also advise the client that no compensation was paid; and
    (c) not permit a non-lawyer to advise the client about title insurance without the lawyer's supervision. (p. 64)

12. Manitoba and Saskatchewan should each amend the appropriate insurance legislation to provide that lawyers are entitled to arrange title insurance on behalf of their clients. (p. 66)

13. Manitoba and Saskatchewan should each amend the appropriate consumer protection legislation to require lenders who are requiring or recommending title insurance to mortgagors, whether or not "bundled" with transaction management services, to provide the mortgagor with the following information:
    (a) a statement that title insurance is not mandatory;
    (b) other methods of assuring title that are available in the absence of title insurance;
    (c) the relationship between the lender and the title insurer and any direct or indirect benefits the lender is being provided in return for offering the service in question; and
    (d) a breakdown of the fees payable for title insurance and any "bundled" services. (p. 71-72)

14. Manitoba and Saskatchewan should each amend the appropriate insurance legislation to require title insurers to include in every residential policy a term insuring against losses suffered as a result of an error or omission in a document prepared by a third party service provider and submitted for registration to a land titles office. (p. 72)

15. Manitoba and Saskatchewan should each undertake further study with respect to the concept of requiring vendors of residential real property to provide potential purchasers with extensive disclosure. (p. 75)

APPENDIX A

INFORMAL CONSULTATION PARTICIPANTS
JANUARY – MARCH 2004

Association of Manitoba Land Surveyors

Central Manitoba Bar Association

City of Winnipeg, Planning, Property and Development Department

Credit Union Central of Manitoba

First Canadian Title

Fidelity National Financial (FNF) Canada

Law Society of Alberta

Law Society of Manitoba

Lawyers' Professional Indemnity Company (LawPRO)

Office of the Superintendent of Financial Institutions Canada

Property Registry of Manitoba

St. Paul Guarantee Insurance Company

Stewart Title Guaranty Company

Superintendent of Financial Institutions of Manitoba

APPENDIX B

CONSULTATION PAPER RESPONDENTS
JUNE – OCTOBER 2005

Association of Manitoba Land Surveyors

E.D. Brown, Pitblado L.L.P.

Canadian Institute of Mortgage Brokers and Lenders

Consumers Council of Canada

Fidelity National Financial (FNF) Canada

Fidelity National Financial (FNF) Canada, First Canadian Title, Lawyers Title Insurance Corporation and St. Paul Guarantee Insurance Company: Joint Submission

First Canadian Title

D. Graham, Derek G. Graham Limited

Information Services Corporation of Saskatchewan

Land Title and Survey Authority of British Columbia

Law Society of Manitoba

Lawyers' Professional Indemnity Company (LawPRO)

Manitoba Professional Land Surveyors Business Group

Office of the Superintendent of Financial Institutions Canada

Property Registry of Manitoba

Professor N. Siebrasse, Faculty of Law, University of New Brunswick

Stewart Title Guaranty Company

R.L. Tyler, Aikens, MacAulay, Thorvaldson LL.P.

Western Law Societies Conveyancing Project

PRIVATE TITLE INSURANCE

EXECUTIVE SUMMARY

A. INTRODUCTION

In May of 2002, the Minister of Justice and Attorney General of Manitoba asked the Manitoba Law Reform Commission to review and make recommendations on the issue of private title insurers. The Minister identified six issues of concern, which included areas of potential risk to buyers, to the land titles system and to the survey infrastructure of the province.

The Manitoba Law Reform Commission collaborated with the Law Reform Commission of Saskatchewan on the review, and this report is a joint report of the Commissions.

This report considers the effects of title insurance in the context of residential real property conveyancing. The Commissions were concerned with the maintenance of public confidence in the real property system, particularly with respect to consumer protection and the protection of public infrastructure. The Commissions have made recommendations to protect the interests of purchasers and to protect the public land registration system, while ensuring as much freedom of choice as is compatible with those goals.

B. GENERAL OVERVIEW

The real property system in western Canada includes three components that form the foundation for security of title and quiet possession of land: the land titles system, the survey fabric and the land use management system.

The Land Titles System

All privately-owned land in Saskatchewan and most privately-owned land in Manitoba is registered in a Torrens land titles system. The mandate of the land titles system is to simplify and facilitate land transactions while providing certainty of title. The system's main attributes are a government-administered register, a guarantee of registered fee simple interests and a compensation scheme to provide compensation for certain losses. Land titles systems have been implemented in most Canadian jurisdictions; in some cases the older deed registry system will be replaced on a gradual basis as land is transferred.

Under a deed registry system, a buyer must search the chain of title back to the original grant from the Crown to ascertain the seller's interest in the land. Under the land titles system, this requirement is eliminated. Instead, title is surrendered to the Crown upon every transfer of land. The government then conveys the legal interest to the buyer and guarantees the title. The registered owner of the land has an indefeasible title, guaranteed by the state and, at least in theory, secure against all prior interests or claims and subject only to other prior registered

interests. An owner of an interest in land who is deprived of that interest through the operation of the system or official error is entitled to an indemnity for the loss.

While the land titles system provides increased certainty, it has some substantive and procedural weaknesses. There are exceptions to the principle of indefeasible title: the register may be corrected in case of misdescription, error or fraud, and in cases where two certificates of title exist for the same parcel of land, the certificate issued first prevails. While these exceptions introduce some insecurity, compensation may be available to an owner who is deprived of his or her registered interest. A further exception relates to overriding unregistered interests, such as certain easements and rights-of-way. A buyer may be bound by these unregistered interests, and compensation is not available for any associated loss.

Fraudulent land transactions, while still rare, are said to be increasing and are of serious concern. The fraud may take various forms, including title fraud, mortgage fraud and fraud committed by lawyers carrying out real estate conveyancing. The rights of fraud victims, the compensation available to them and the process to be followed to obtain compensation varies under the provincial statutes.

The registration gap is a point of weakness in the land titles system and presents a selling point for title insurance. The gap is the period between the closing of a real property transaction and the establishment of priority by registration in the register; the longer the gap, the greater the risk for parties seeking to register new interests. In Manitoba and Saskatchewan, the preference given to builders' liens also creates an obstacle. A builder's lien will take priority over a mortgage if the lien is recorded after the mortgage registration but before proceeds are advanced. These factors cause a delay in the release of sale and mortgage proceeds until registration is complete.

The Survey Fabric

The survey infrastructure, or 'fabric', is the system by which land is divided into parcels. The fabric is based on original Dominion Government surveys, further subdivided by plans of roads and subdivisions. The survey fabric provides the geographic underpinning of the land title registration system; an accurate, well-defined and properly maintained survey fabric is required to support efficient real estate transactions, land use planning and enforcement, geographic information and mapping, construction and flood control measures. Further, the effectiveness of the guarantee of title is questionable if the boundaries of the described land cannot be ascertained.

There has been a deterioration in the survey fabric in Manitoba and Saskatchewan. As well, lenders no longer require as a matter of practice that buyers obtain building location certificates or real property reports to assure the security of mortgage loans. As a result, it has become increasingly less likely that existing survey defects will be identified and corrected.

Land Use Management

Municipalities attempt to balance the rights of individual property owners and the interests of the community in orderly and planned development, public safety and economic development through zoning and planning by-laws. In a real property transaction, the buyer assumes the consequences of any non-compliance with zoning and planning requirements that is not remedied before closing. In traditional conveyancing practice, the buyer's lawyer inquires with the municipal authority to identify non-compliance. This practice, which was the primary means of bringing compliance issues to light, also appears to be decreasing. This may have consequences both for private interests, with respect to the cost of bringing property into compliance and the loss in value, use and enjoyment of land, and for the public interest, as the integrity of the land management system deteriorates over time.

C. TITLE INSURANCE

A title insurance policy in respect of real property is a contract under which the insurer agrees to indemnify the insured for certain losses relating to an interest in land. Generally, the policy insures against loss caused by a defect in title, the existence of a lien or encumbrance, a defect in a document that evidences a security interest or deed of trust, or any other matter defined in the policy that affects the title or the right to use and enjoy the property. Insurance is available for residential and commercial property, and for owners and lenders in purchase and refinance transactions. It may include coverage for problems that existed at the date the policy was issued but were undiscovered, as well as for future risks related to fraud, forgery and encroachment.

Critics of title insurance argue that it is of limited value in a land titles system, as it duplicates the compensation provided through the system. This is compounded when both the owner and lender have title insurance and the loss is covered by the statutory compensation scheme. On the other hand, proponents assert that title insurance may complement the land titles compensation scheme; for example, in covering losses resulting from overriding unregistered interests. Compensation under title insurance is also said to be more convenient to obtain and to be paid more quickly. Title insurance facilitates the release of mortgage and sale proceeds on closing, and may insure off-title matters, such as survey defects and zoning non-compliance, that the land titles system does not cover. While critics of title insurance prefer traditional conveyancing practice as a means of discovering and addressing these off-title matters, proponents of title insurance argue that insurance is a less expensive option.

Title insurers are subject to the regulatory provisions that apply to other insurance companies, with respect to incorporation, capitalization and reporting requirements. Recent amendments to *The Consumer Protection Act* in Manitoba and the *Cost of Credit Disclosure Act, 2002* in Saskatchewan impose stringent requirements on lenders with respect to the disclosure of borrowing costs, and permit borrowers to purchase mandatory insurance from insurers of their choice and to cancel optional services, such as insurance. The amendments specifically refer to title insurance. Manitoba insurance legislation has additional provisions prohibiting unfair or deceptive practices, and in both Manitoba and Saskatchewan an insurer may be prohibited from using a policy, application or endorsement that is unfair, fraudulent or not in the public interest.

The Ontario legal profession offers a title insurance product through the errors and omissions insurer of the Law Society of Upper Canada. The insurance aims to retain some of the consumer protection aspects of traditional conveyancing practice, by incorporating certain conveyancing requirements into underwriting practice and terms of coverage. In western Canada, greater resistance by lawyers to title insurance continues. In 2001, the western law societies developed the Western Law Societies Conveyancing Protocol, which sets practice standards intended to provide similar benefits to title insurance. Under the Protocol, a lawyer may release the solicitor's opinion on title immediately upon closing, facilitating the release of mortgage proceeds. Any loss suffered by a buyer or lender as a result of an intervening registration will be indemnified by the professional liability claims fund. A lender who waives the requirement for a current survey will also be indemnified from the fund. However, most major financial institutions continue to prefer the more extensive protection offered by title insurance.

D. PROTECTION OF PUBLIC SYSTEMS

The initial question considered by the Commissions was whether a ban on the sale of title insurance is justified. It is possible to foresee a negative impact on the land titles system when defects in title or land use are insured over rather than corrected. However, in the Commissions' opinion, a ban would be a disproportionate response to the possible harm, and would not address the underlying weaknesses of the real property system to which title insurance has been a response. Instead, other measures should be considered that may reduce any possible harm to the public interest while preserving access to a product that benefits some consumers.

Implementation of the 1990 and 1993 recommendations of the Joint Land Titles Committee would improve the integrity and reliability of the land titles system and close many of the gaps in protection. To help to ensure that certificates of title accurately reflect the current state of the title, the Commissions also recommend legislative amendments to require that interest holders discharge registered interests within 30 days after the interests cease to exist. The amendments should also provide for a fine for a failure to comply and for liability for losses that result from non-compliance.

Amendments to confer priority on registered interests according to their initial entry rather than completion of registration, and the reform of registry procedures to ensure that applications are entered upon receipt or at least in the order in which they are received, would address some of the problems caused by the registration gap. Further, the registration gap is in principle a malfunction of the registration system, and extending compensation to losses resulting from the gap would render both title insurance and the Western Law Societies Conveyancing Protocol less necessary. The Commissions recommend that both Manitoba and Saskatchewan amend their legislation to extend compensation for these losses, and that Manitoba provide for ongoing funding of the assurance fund.

The Commissions are not prepared within the scope of this report to recommend a government-administered insurance scheme to replace the existing compensation system, or to recommend a substantial expansion of the scope of the indemnity. The Commissions do

recommend modest extensions, to provide expressly for immediate indefeasibility for fee simple interests for innocent purchasers, and to permit payment of compensation for error even when the claimant is partially responsible for the loss.

The Commissions considered mechanisms to reduce the incidence of fraud, and are not persuaded that measures to restrict public access to the land titles system are justified. In Saskatchewan, a program to notify owners of the registration of mortgage instruments is useful and should be implemented in Manitoba. Manitoba's legislation should also be amended to provide that the assurance fund is a fund of first resort, which would reflect the current practice of the Registrar.

Survey defects and non-compliance with planning and zoning requirements affect not only the property owner, but also his or her neighbours and the broader community. Nevertheless, the Commissions do not consider it appropriate to place additional requirements on residential purchasers. Rather, a more proactive approach by the provinces to the protection of the survey fabric is required.

The Commissions considered whether the land titles registry should be expanded to incorporate survey and zoning registers in order to create a better mirror of the title. A more comprehensive register would be significant improvement to the land titles, survey and land management infrastructure. The Commissions recommend that both Manitoba and Saskatchewan consider creating an integrated land records database to provide a broad and comprehensive range of information about land.

E. CONSUMER PROTECTION

Critics allege that title insurance, associated transaction management services and the bundling of services compromise consumer protection by threatening access to independent legal advice in real property transactions and making it difficult for consumers to make informed choices. Pressures may also be placed on the lawyer-client relationship by the inclusion of indirect benefits for the lawyer in a title insurance policy, including the insurer's waiver of the right of subrogation.

In the Commissions' view, additional rules of professional conduct regarding a lawyer's professional obligations with respect to title insurance would help to protect the interests of consumers considering the purchase of title insurance. The Commissions are not persuaded that lawyers should be prohibited from applying for title insurance on behalf of their clients, and recommend that the relevant legislation clearly provide that lawyers are permitted to do so. As well, consumer protection legislation should be amended to require those that offer title insurance to borrowers to disclose specific information about the insurance, fees, other methods of assuring title and any benefits to the lender or person promoting the insurance in return for offering the insurance to the borrower. The appropriate insurance legislation should also be amended to require title insurers to include protection against losses suffered as a result of document preparation errors by third party service providers.

To the extent that transaction management service providers may engage in the unauthorized practice of law, the Law Societies of Saskatchewan and Manitoba currently have the power to investigate and prosecute such activities, and the Commissions are of the view that no further legislation is required.

The Commissions considered the obligations imposed on sellers of residential property in some other countries to provide potential purchasers with extensive disclosure about the property, and this concept may have merit. While it is beyond the scope of this report to examine the issue in detail, further study should be undertaken.

The Commissions note that the payment of referral fees from insurers to lenders and lawyers is already prohibited by legislation and professional codes of conduct. Under the recent amendments to consumer credit legislation in Manitoba and Saskatchewan, the disclosure of fees and premiums charged is also required. In the Commissions' view, additional regulation of title insurance premiums is not necessary to protect consumers.